IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 273

NATIONAL LABOR RELATIONS BOARD,

PETITIONER,

v.

GENERAL DRIVERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS UNION, LOCAL NO. 886, AFL-CIO,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

ECONOMIC BRIEF FOR RESPONDENT

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THE "HOT CARGO" PRINCIPLE AND TRADE UNIONISM IN THE AMERICAN COMPETITIVE ECONOMIC SYSTEM

I. The "Hot Cargo" Principle is a Necessary Instrument of Union Organization

"Hot Cargo" is a term which refers to the refusal by union members to handle non-union or struck goods or services. Such refusal constitutes a form of organized action by trade unions designed to achieve or extend union organization; to protect union standards; and to express labor solidarity.

Such organized action to achieve the same or similar ends is not confined to labor unions. It is a common characteristic of all groups subject to the uncertainties of a market economy. Thus, businessmen desire protection from foreign competition to protect their sales opportunities, while farmers demand government action to prevent the undermining of parity prices. Fundamentally, all such action is designed to achieve a greater degree of security in an economy in which the well-being of individuals and groups is subject to substantial and often unpredictable changes.

Under modern industrial conditions, unions must, in self-preservation, extend their organization throughout an industry in order to be effective. To protect and enlarge their members' job opportunities, they must standardize wages and working conditions. Such standardization—a prime objective of unions—is imperative under our competitive economic system. The "hot cargo" principle is a traditional union technique to effect organization and, thereby, standardization.

A. The "Hot Cargo" Principle Helps to Standardize Wages and Working Conditions—a Basic Union and Public Policy Objective

Our present-day scale of industrial, commercial, and transportational organization virtually makes the entire country one vast market. Industries serve national markets; firms produce for a national market, aided by our

modern transportation system and cross-hauling of products from coast to coast. These factors mean that the area of competition is enlarged, in many industries, beyond the immediate area of the firm.

Industrial organization today is no longer based on the single shop. A single employer in a particular economic field can affect the whole economic area. Especially in highly competitive industries, wages cannot be increased or even maintained, in the face of non-union, unfair competition within the industry. A single employer who refuses to abide by union conditions can, and inevitably does, threaten the standards of the union and its members. Even though non-union employers may be in the minority in any given industry, they obviously constitute pressure against both the union and responsible employers who compete on the merits of their product, not upon labor exploitation.

A modern trade union must concern itself with the many employers in the same industry whose price structure and whose competitive position in the market are dependent upon the union's ability to maintain complete or almost complete organization of an industry.

It has been the age-old aim of unions to try to stop competition between different firms and areas on the basis of wages and to take labor out of competition. Consequently union activity has been directed toward standardizing working conditions throughout an industry or area. The Webbs, in their classic work on trade unions, comment on this policy:

> "This standardization, the Device of the Common Rule, is a universal policy of trade unionism." [1]

Brooks re-states this objective as follows:

> "The basic business principle of unionism is the reversal of the process of competition by establishing a 'standard rate' or minimum wage below which employment shall not be allowed." [2]

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[1] Sidney and Beatrice Webb, *Industrial Democracy*. London: Longmans Green and Co., 1911, p. 560.

[2] Robert R. Brooks, *When Labor Organizes*. Yale University Press, 1937, p. 204.

The necessity for complete organization of the competitive market has been recognized by many labor economists and students of trade unionism:

> "When a union passes the evangelical stages and settles down, one of the most compelling motives in its organization work is to minimize wage competition in its industry. Unions naturally have a stake in keeping their organized establishments in business profitably. To the extent that this is endangered by the fact that nonunion firms paying lower wages can undersell the union firms, *there is a crucial obligation on the part of the union to organize these firms.* Sidney Hillman put the matter very succinctly when he said, 'We have always fought in the non-union markets to protect ourselves in the union markets.'"[3]
>
> * * *
>
> "In competitive industries it is imperative that minimum wage agreements *extend over most of the industry.* Otherwise the nonunion areas undercut the unionized sections and destroy the union."[4]
>
> * * *
>
> "Taking labor out of competition *requires the organization of employees throughout the market* in order to eliminate nonunion competition, and a policy of downward inflexibility, in order to prevent competitive wage cutting."[5]

The unions' justifiable economic interest in non-union employers competing with their own employers, is indicated by the following comment by the Amalgamated Clothing Workers:

> "Early in our history as an organization we recognized that there were definite limits upon our ability to improve and maintain the wage and hour standards of workers employed by a single manufacturer or in a single market, unless we succeeded in raising the standards of all competing manufacturers and markets up to the same level. Thus, throughout our history, we

[3] Jack Barbash, *Labor Unions in Action.* Harper & Brothers, 1948, p. 14 (Emphasis supplied.) Footnote in original deleted.

[4] Brooks, *op. cit.*, p. 205. (Emphasis supplied.)

[5] Arthur M. Ross, *Trade Union Wage Policy.* University of California Press, 1948, p. 48. (Emphasis supplied.)

have been confronted with the problem of stabilizing the clothing industry by taking measures to equalize the labor costs of competing manufacturers."[6]

Judicial notice of this fact is evidenced in the following citation:

> "[The Union is] as interested in the wages of those not members, or in the conditions under which they work as in its own members because of the influence of one upon the other. All engaged in a trade are affected by the prevailing rate of wages. All, by the principle of collective bargaining.
>
> Economic organization—today is not based on the single shop. Unions believe that wages may be increased, collective bargaining maintained only if union conditions prevail, not in some single factory but generally."[7]

By the 1920's, reports Gregory, all nationally affiliated unions were thoroughly committed to the necessity of unionizing:

> ". . . all units in every industry in which a union was already established. The reason for this position was that no union could endure competition in any national market between its own union-made goods and non-union standards, chiefly the wage differential. This economic program had become of such momentous importance to unions that it may be said to have become the very essence of American labor unionism itself. Certainly, this program went to the very heart of their organizational compaigns. They simply had to pursue it relentlessly if they were going to survive at all."[8]

This objective was to be achieved, using traditional union techniques, by extending union organization into non-union plants, trades, and establishments. Mr. Justice Stone, in speaking of this objective in the *Apex* case, stated that:

> ". . . in order to render a labor combination effective it must eliminate the competition from nonunion-made

[6] Report of the General Executive Board to the Thirteenth Biennial Convention of the Amalgamated Clothing Workers of America, 1940, p. 32. Cited in Seidman, *The Needle Trades*, p. 276.

[7] *Exchange Bakery* v. *Rifkin*, 245 N. Y. 260, 263, 157 N. E. 130.

[8] Charles O. Gregory, *Labor and the Law*, W. W. Norton and Co., Inc., New York, 1946, p. 216.

> goods . . . an elimination of price competition based on differences in labor standards is the objective of any national labor organization." [9]

One of the ways the American labor movement has sought to standardize wages and working conditions has been to press for Federal or State legislation to protect certain groups of workers or to establish minimum standards applicable to all workers. For example, under the Fair Labor Standards Act, minimum wage and hour standards have been established in much of American industry, thus moving the area of collective bargaining on these issues to higher levels.

In Western European countries collective bargaining negotiations on a national or regional level usually result in agreements *which are applicable to all workers in the industry, whether or not they are members of the bargaining unions.* In addition, a number of countries, Germany and France, for example, have provided for the formal legal "extension" of the terms of agreements to employers and workers in the industry or geographic area covered by the agreement.[10]

However, the chief method used by organized labor in this country in achieving standardization has been through collective bargaining and expanding union organization. By organizing the entire industry, and thereby standardizing employment conditions throughout the industry, the union can eliminate the competitive hazard to already established standards in existing unionized units.

Gregory sums up this basic procedure and objective as as follows:

> "It is now a commonplace to think of unionism affiliated on a nation-wide basis as a device primarily for eliminating the competition between union-made and nonunion-made goods in the same markets." [11]

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[9] *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469 at 503 (1940).

[10] Walter Galenson, ed., *Comparative Labor Movements.* Prentice-Hall, 1952; p. 307 et seq; 379 et seq.

[11] Gregory, *op. cit.*, p. 418.

Hoxie, in his classic study of American trade unions arrives at the same conclusion:

> "The principle of uniformity . . . is the central and fundamental principle of trade union policy and is absolutely essential, from the point of view of the dominant type of unionism, to its successful functioning." [12]

Unions must, by the very force of competition in our industrial society, not only try to establish and maintain but also to extend the area of uniformity of conditions, for employer and workers:

> "[The union is interested] in an area as wide as the product market in which it operates because it considers low wage areas an unfair competition. The union, therefore, presses for wage standardization. *The employers in the high-wage areas are also in favor of wage standardization because they don't wish to risk the possibility of price competition caused by differences in labor cost.* The workers in the low-wage areas are also interested in wage standardization. They don't like the idea of working at low wages on a product that sells in the market for the same price as the product of their high-wage neighbors." [13]

McCabe recognizes this principle in the following terms:

> "It is only logical that the union should be the initiator in widening the area of collective bargaining, inasmuch as the union is the initiator of collective bargaining itself. The same reasons that lead the union to attempt to establish collective bargaining in the shop usually impel it to spread the bargaining over a wider area than the single shop, to the locality at least. The desire for what the Webbs termed the 'standard rate' generally leads to standardization over an area wider than the single shop by an 'organized' local or national union.' It is not meant to imply that the area of the standard rate and the area of collective bargaining must be identical. But widening the latter is one way

[12] Robert F. Hoxie, *Trade Unionism in the United States.* D. Appleton-Century Co., 1936, p. 347.

[13] W. Ellison Chalmers and Scott MacEachron; *Master Agreements in Collective Bargaining.* Institute of Labor and Industrial Relations, University of Illinois Bulletin, Vol. 47; No. 22; November 1949, p. 8. (Emphasis supplied.)

of implementing the widening of the former as well as of the area of other elements in the terms of employment." [14]

In brief, as a matter of economic survival, unions must strive to establish uniformity of working conditions throughout the industry in which they operate. Within this basic framework, the "hot cargo" clause or principle was early adopted by American trade unions as a defensible and justifiable organizing tool.

B. History and Development of the "Hot Cargo" Principle

The refusal to handle or patronize "unfair" goods or "hot cargo" is a principle followed for centuries in all parts of the world and in all forms of social or economic relationships.[15] One need only recall in our own history the refusal by American colonists to buy British tea, the Abolitionists' refusal to buy slave-made products, the refusal to purchase Japanese silk in the 1930's, "Buy American" campaigns, etc.

The practice has been widely employed by the various groups—by the members of a national or racial group, by organized groups of consumers, by groups of businessmen, by labor organizations.

In the labor field, the refusal of union members to perform any work on non-union or struck goods or to supply goods to non-union shops is one of the most tradjtional and widespread of the tactics which labor finds essential in its efforts to maintain decent standards.[16] It has found wide

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[14] David A. McCabe, *Union Policies As to the Area of Collective Bargaining*, in *Interpreting the Labor Movement*, Industrial Relations Research Assn. 1952, p. 112.

[15] Encyclopedia of Social Sciences, *Boycott*, vol. 2, 1930, p. 662.

[16] See *Strikes and Lockouts* (Preliminary Draft) U. S. Department of Labor, Bureau of Labor Statistics, Industrial Relations Branch (Feb. 1947). Laidler, Harry W., *Boycotts and the Labor Struggle*, Part III, New York, John Lane Co., 1913; Wolman, Leo, *The Boycott in American Trade Unions*, Chapter III, Baltimore, The Johns Hopkins Press, 1916; Millis and Montgomery, *Organized Labor*, pp. 581-591, McGraw-Hill Book Co., N. Y., 1945.

acceptance by employers through the United States.[17] It has been described as "almost exclusively an American institution."[18] Union members early felt the necessity for eliminating non-union competition. They firmly believed that the collective security of the whole group, an equality of bargaining power, and an adequate share of the national income could only be obtained through establishing non-competitive markets for labor.

Instances of the refusal to work on non-union goods or materials can be found as far back as the early 1800's. Wolman's detailed study reports that:

> "The general strike of the New York cordwainers in 1809 was caused by the fact that the employers 'originally involved' had attempted to have their goods manufactured in other shops, and had, consequently, precipitated strikes among the workmen of other employers, who refused to contribute to the production of unfair goods. In 1827 the journeymen tailors of Philadelphia struck against several master tailors. When the master tailors later attempted to have their work done in other shops, the strikers succeeded in persuading the journeymen there employed to refuse to do the work while the orders of the unfair firms were being received. Within the category of boycotts on materials falls the action taken by the journeymen stone cutters of New York, when in 1830 they imposed a boycott on convict-cut stone. 'Most of the stone cutters,' they said, 'have entered into a voluntary agreement to refrain from working stone from the states' prisons, and deputations have been sent to those who continued to work such stone.'"[19]

By about 1880, the refusal to handle unfair goods was generally adopted by labor unions.[20] Among the factors responsible were: (1) solidarity within the ranks of the Knights of Labor which permitted such action to be ap-

[17] See Bureau of National Affairs, *Collective Bargaining Negotiations and Contracts*, Sec. 77, 1947.

[18] Wolman, *op. cit.*, p. 41. See also Millis & Montgomery, *op. cit.*, p. 582.

[19] Wolman, *op. cit.*, pp. 22-23. Footnotes in original deleted.

[20] Wolman, *op. cit.*, p. 24.

plied extensively and by a large group; and (2) increasing division of labor and specialization, which made replacement of striking employees with decreasing skill a simple task. Semi-skilled and unskilled workers could be hired rather easily and trained quickly. Thus, often through lack of choice, the "hot cargo" principle was brought to the front as an effective labor weapon.

Such unions as the Brewery Workmen and the Typographical Union carried on successful campaigns against non-union products and materials and thereby effected the organization of large non-union plants.[21] A large number of other unions carried on such programs—the United Hatters, Metal Polishers, Garment Workers, Carpenters, Bakers and Confectioners, Coopers, Printers, Bookbinders, —as well as the various railroad unions.

Wolman cites a "typical instance" by railroad laborers on a "fair" or union road of refusal to handle the rolling-stock of railroads that were unfair to their employees:

> "For example, the persistent opposition of the Wabash Railroad Company to the Knights of Labor caused the general executive board of the Knights to issue in 1885 an order to all members 'employed on the Union Pacific and its branches and on Gould's Southwestern system that they must refuse to handle or repair Wabash rolling stock.'" [22]

Janes describes the policy of the Locomotive Engineers as follows:

> "The policy of the railroad brotherhoods is to refuse to allow their members to take the place of a striker or to do any of the work of a striker in any strike inaugurated by any recognized labor organization. The Locomotive Engineers are instructed not to do any work which they would not do if there were no strike. If the machinists are on strike, the engineers have no right to do the machinists' work." [23]

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[21] Ibid, p. 33.

[22] Wolman, *op. cit.*, p. 59. Footnote in original deleted.

[23] George Milton Janes, *The Control of Strikes in American Trade Unions*. Johns Hopkins Press, 1916, p. 82.

Implicit in this policy is the view that handling struck work is tantamount to strike-breaking.

In 1890 the Brotherhood of Locomotive Engineers passed a resolution forbidding its members to handle property belonging to any railroad involved in a strike.[24]

Wolman also cites adoption of the principle of "hot cargo" in the building trades near the turn of the century:

> "In 1897 there was organized in Chicago a federation composed of the sash and door makers, terra cotta workers, brick-makers and others, to be known as the Building Material Trades Council. This organization was sponsored by the Chicago Building Trades Council; and it was the intention at the time that the two organizations should work in harmony, 'the material men refusing to work on material for a building upon which non-union men were engaged in constructing and the building trades refusing to handle material made in non-union establishments.'" [25]

The views and practices of building trades unions on working on non-union materials is highlighted below:

> "Most bitter controversy has been aroused by the third of the cardinal principles—'there shall be no restriction of the use of any raw or manufactured material except prison-made'—than by any of the others. So strong was the opposition to work on non-union materials that Congressman Madden was obliged to exempt cut and sawed stone, granite, exterior marble work, common brick, and wood mill-work from his proposed compromise agreement in 1900. The Sheet Metal Workers, Electrical Workers, and Fixture Hangers had a restriction against non-union materials by unwritten law for years. The great strike of 1913, which resulted in a general lockout, was brought about by the Marble Setters' violation of Cardinal Principle No. 3. The Carpenters always opposed this provision, and although they agreed to the Uniform Form in a compromise settlement of the strike in 1915, they

[24] Encyclopedia of the Social Sciences, *Boycott*, vol. 2, 1930, p. 664. Janes puts the date as 1889. George M. Janes, *op. cit.*, p. 81.

[25] Wolman, *op. cit.*, p. 69.

changed the third principle in the agreement of 1918 to read that there should be no restriction upon any materials 'except prison-made and non-union.'" [26]

And shortly after the turn of the century, in the printing trades:

"Both the Printing Pressmen and the Stereotypers have refused to handle 'strike-bound' composition. During the eight-hour strike of the Printers in 1905-1907 the Stereotypers in New York, Chicago, Cincinnati, Minneapolis, Richmond, Virginia, and other cities went out on prolonged strikes because they were asked to handle non-union matter." [27]

Wolman cites another illustration in the printing trades:

"The Allied Printing Trades Council is composed of the Typographical Union, the Printing Pressmen, the Stereotypers and Electrotypers, the Bookbinders, and the Photo-Engravers. At a conference in 1908 the effect of the council could be seen by the adoption of a resolution which recommended 'whenever practicable' the refusal by the constituent unions to use 'photo-engraved plates unless such plates were stamped with the union label of the International Photo-Engravers' Union.'" [28]

Longshoremen in 1893 adopted the following rule with respect to working on ships loaded or unloaded by non-union men:

"The Longshoremen collect a fine from an employer before they allow their members to load or unload a vessel that has been loaded or unloaded by non-unionists. This rule was adopted by the union in 1893, one year after its organization, and is still retained. In case an employer refuses to pay the fine levied against the vessel and continues to employ non-unionists to do loading and unloading, provision is made for doubling the penalty. The amount of the original fine is based

[26] Royal E. Montgomery, *Industrial Relations in the Chicago Building Trades*, University of Chicago Press (1927), pp. 81-82.

[27] Frank T. Stockton, *The Closed Shop in American Trade Unions*, Johns Hopkins Press (1911), p. 112. Footnote in original deleted.

[28] Wolman, *op. cit.*, p. 70. Footnote in original deleted.

in general upon the difference between union and non-union wages."[29]

Stockton summarizes the practices of other unions during this period with respect to non-union shops, or shops on strike, or shops regarded as "unfair" by another local of the same national union:

> "If an employer is 'scabbed' or becomes 'unfair' or has a strike called against him in one shop, it is the policy of many unions to strike all of his shops. Thus the Plasterers provide that no member of the union shall be allowed 'to work for any firm or corporation after the Executive Board has decided said firm or corporation unfair.' The general executive board of the Plumbers has power to suspend any local union which allows its members to work for an employer who has been declared 'unfair' in another local. The Molders forbid their members to work on patterns brought from a struck shop or to work for an employer who takes a contract from another employer whose shop has been struck. The Pattern Makers, the Saw Smiths, and many other unions refuse to work on jobs that come from shops where strikes are in progress.
>
> "The Musicians have a rule that when a theatre is placed upon the 'unfair' list of the union, all other theatres under the same management, wherever located, shall be declared 'unfair' by the executive board. . . . *In all unions, when an employer is on the 'unfair' list of the national organization, members of all local unions are forbidden to work for him.*"[30]

Since 1903, two unions composed the Allied Wall Paper Trades, namely, the Print Cutters and the Machine Printers and Color Mixers. Cooperation between these two unions with respect to "hot goods" is described below:

> "Even when the cutting and the printing are done in separate establishments the Machine Printers will not handle non-union 'prints,' nor will the Print Cutters cut patterns for non-union printing houses."[31]

[29] Stockton, *op. cit.*, p. 88. Footnote in original deleted.
[30] Ibid. pp. 90-91. Footnote in original deleted. Emphasis supplied.
[31] Stockton, *op. cit.*, p. 117.

The solidarity of union members with respect to unfair employers is shown in the following:

> "In the Plumbers and the Lathers a strike in any particular shop means that the employer has become unfair throughout the entire jurisdiction of the union, and no member can work for him, directly or indirectly, until the strike has been settled. Any local union of the Plumbers permitting its members to work for such an employer is liable to suspension. In the Tin Plate Workers a legalized strike in any district requires the members to stop work at the same time in any mill or works in the district belonging to the firm or corporation against which the strike has been called, and the national president is authorized after the strike has continued for seven days to extend the strike to all the works of said corporation or firm." [32]

It is significant that while bans on unfair goods had often been substituted for strikes by the Knights of Labor, they were used from the nineties on in connection with pending strikes or as a method of carrying on against a firm when a strike was unsuccessful.[33]

Many unions during this period exhorted and encouraged their members, in their official journals, not to work on unfair goods and to patronize fair employers so as to assist in the organization of non-union firms.

> "Frequent references are found throughout the journals of the International Association of Marble Workers in which the officers encourage the organization of the shopmen on the ground that 'the shopmen can help the setter, by refusing to supply the finished material to employers who employ other than members of the International Association of Marble Workers.'" [34]

At about the same time, too, several unions codified their views on unfair goods by incorporating in their constitutions a ban on unfair or struck goods:

> "On the same theory, the Granite Cutters' Union has

[32] Janes, *op. cit.*, pp. 85-86. Footnotes in original deleted.
[33] Encyclopedia of the Social Sciences, *op. cit.*, p. 664.
[34] Wolman, *op. cit.*, p. 57. Footnote in original deleted.

in its national constitution a section devoted to 'work sent elsewhere during a strike,' which states that 'when the members of a branch are on a strike or are locked-out, and where the employers send their work to another locality to be cut, no other branch should allow its members to cut such work for any employer to help out the employer where the strike or lockout is going on.'" [35]

Not only do the Granite Cutters refuse to cut or trim work which has been purchased by an employer from the stock of an "unfair" or non-union firm, but they also object to cutting granite in the rough which is to be shipped to non-union yards for completion.[36]

The 1906 convention of the International Typographical Union adopted the following constitutional provision:

> "Subordinate unions, in making contracts or wage agreements, shall insert a clause therein reserving to their members the right to refuse to execute all struck work received from or destined for unfair employers or publications."

This was amended to read (by the 1921 ITU Convention):

> ". . . to refuse to execute all work received from or destined for struck offices, unfair employers or publications."

Stockton cites actions of the Teamsters Union during this same period:

> "In one or two cases the Teamsters have refused to unload railway cars that had been loaded by non-union men in other cities. This action was taken only after the local unions where the loading had been done had appealed to other local unions to strike against handling the cars." [37]

In the mid-nineties, the American Federation of Labor in its official magazine started a "We Don't Patronize" list

[35] Wolman, *op. cit.*, p. 61. Footnote in original deleted.

[36] Stockton, *op. cit.*, p. 94.

[37] Ibid., p. 95. Footnote in original deleted.

in which it listed the names of scores of "unfair" firms and assisted in other ways the refusal to handle campaigns waged by the national and international unions.

C. The "Hot Cargo" Principle Embodies the Basic Philosophy of Unions and Expresses the Unity of Interest of Union Membership

The principle embodied in "hot cargo" represents the moral code for trade unionists; its application is the badge of labor solidarity. The right to refuse to handle unfair goods is a basic tenet of unionism. It represents devotion to a union cause, sympathy with labor interests, organizational ties. This is made eloquently clear by John Mitchell, President of the United Mine Workers in the early 1900's:

> "A wise sympathetic strike which involves no violation of contract, and is of such a nature as directly and powerfully to influence the result of the original conflict, a strike carved out, not for the immediate good of the members of the union, but for that of other workmen, emphasizes, as no other event in industrial life, the universal brotherhood and solidarity of labor. There is nothing inherently and necessarily wrong in doing for others what we would that they should do for us, and a strike is not made immoral by the fact that the strikers permit others than themselves to be the gainers thereby. It sometimes happens that the weaker organizations, composed of oppressed workmen (and the more oppressed they are, the weaker their unions are apt to be) can only secure reasonable and humane conditions by and through the assistance of workingmen in other unions." [38]

There has always been a unity of interest among workingmen and, indeed, among labor unions. It is an economic truism that unfair competition among employers based upon lower wage rates to employees tends to destroy the working conditions and wage standards of all employees.

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[38] John Mitchell, *Organized Labor*, American Book and Bible House, Philadelphia, 1903, pp. 303-305.
Cited in *Unions, Management and the Public*, E. Wight Bakke and Clark Kerr, Harcourt, Brace and Co., New York, 1948, p. 417.

It is therefore evident that the common interests of all labor justify mutual aid in the achievement of like objectives. As a result, unions long ago adopted the policy of refusing to handle the products coming from an employer with whom some other union was in controversy or of otherwise contributing their labor to his enterprise.

Referring specifically to refusal to handle non-union goods, Wolman comments:

> "--materials are often stigmatized as unfair not because union members see in their manufacture encroachments upon their own fields of labor, but because it has become a not infrequent practice for union members to refuse to work upon materials that have been manufactured by workingmen receiving low wages and working long hours in unsanitary shops. Because of sympathy aroused by a knowledge of the conditions under which such materials are produced, coupled with an appeal for aid by the aggrieved workmen, it frequently happens that the members of strong unions will reject materials to whose conditions of manufacture they could, so far as their own working conditions are concerned, afford to be totally indifferent. That these feelings of sympathy for fellow-workmen have in recent years become intensified is indicated by the gradual changes in the type of labor organization that obtains in the United States, considered with special reference to the tendencies of extensive organization and trade federation." [39]

In our system of society we are proud of the fact that workingmen can band together for the purpose of raising wage rates and are not compelled to stand helplessly by and see their living standards destroyed, or even threatened. It is no accident that we have the highest standard of living in the world. It is the result of our philosophy of free competition within the framework of certain minimum basic public rules. Among these time-honored public rules is that workers may help each other by refusing to handle the products or services of an unfair employer or one

[36] Wolman, *op. cit.*, p. 48.

against whom a sister union is striking. Thus, Senator Taft, co-author of the Taft-Hartley Act, stated two years after its passage:

> "The spirit of the Act is not intended to protect a man who . . . is cooperating with a primary employer and taking his work and doing the work which he is unable to do because of the strike."[40]

The purpose of union members refusing to handle non-union or unfair materials is obviously to aid their fellow members in winning a dispute. One of the purposes of collective bargaining and self-organization, according to the Taft-Hartley Act, is "mutual aid or protection." The workers engaged in the dispute at its origin and those who refuse to work on non-union materials while the dispute continues are members of the same union. They do the same kind of work. Is there a sufficient community of interest between the two groups to justify the refusal to handle the unfair goods?

Edward Berman answers in the affirmative:

> "If either group were left unorganized the other group would be weakened, since it would be in constant danger of being underbid by unorganized workers seeking and capable of filling jobs in its own industry. Hence the efforts of the national union to organize both groups. . . . Hence also the readiness of one group to protect the wages and the bargaining power of the others. In view of the foregoing considerations one is led to the conclusion that the refusal of a skilled group to work upon materials made by non-union workers who possess the same type of skill is a justifiable attempt to protect their own interests and those of their fellow members."[41]

The doctrine of mutual aid, through refusal to handle goods of an unfair employer is, of course, most applicable when the workers of locals involved belong to the same national union and are in the same industry. In such event,

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[40] 95 Cong. Rec. (1949), p. 8709.

[41] Edward Berman, *Labor and the Sherman Act*, Harper and Brothers, New York, 1930, p. 256.

the interest and joint concern over the standardization and maintenance of employment standards among all competing employers is the more intense. In 1911, Professor Stockton described this concept in the following terms:

> "The idea that the interests of all local unions are the same has been much promoted by the increasing power of the national unions. *That strong local unions should aid weak ones is fundamental in the most highly developed American unions.*" [42]

Professor Gregory sympathetically describes the mutual aid doctrine of "hot cargo" in these terms:

> "A somewhat similar situation might occur when a large non-union printing establishment which, in the opinion of the pressmen's union, has jeopardized the position and security of the union throughout the printing industry, seeks the aid of unionized competitors in getting out weekly and monthly periodicals during rush seasons. If the union ordered its members in these other shops not to work on any of the non-union company's jobs, their refusal to do so would no doubt cause a good deal of damage. But this pressure would seem quite justifiable under the circumstances in view of the union's interest in stabilizing employment standards throughout the industry and by unionizing the publishing house in question. Certainly it could justify its conduct as a refusal to help that company which presents to it the most serious economic threat to its standards in other plants in the industry." [43]

In the same vein, Justice Holmes declared:

> "Union organization is part of the struggle for life and the losses to employers and other employees are costs of freedom and competition." [44]

Our courts have recognized the community of interest of unions (and employers) in fair standards equally applicable to all in the same line of business. Chief Justice

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[42] Frank T. Stockton, *The Closed Shop in American Trade Unions*, The Johns Hopkins Press (1911) p. 97. Emphasis supplied.

[43] Gregory, *op. cit.*, pp. 126-127.

[44] Vegelahn v. Guntner, 162 Mass 92, 44 N. E. 1077 (dissenting opinion).

Taft in *American Foundries v. Tri-City Council*, in speaking of labor union organization for the purpose of mutual help, said:

> "To render this combination at all effective, employees must make their combinations extend beyond one shop."

In the Apex case the Supreme Court declared:

> "An elimination of competition based on differences in labor standards is the objective of any national labor organization."

And in the Swing case the entire Court agreed that—

> "Interdependence of economic interests of all engaged in the same industry has become a commonplace." (312 U.S., at 326)

The doctrine of mutual aid embodied in the refusal to handle unfair goods is highlighted in this brief account:

> "Although there was much bitterness between the railroad engineers and the trainmen, on the one side, and the rest of the railroad unions, on the other side, the nonstriking unions honored the 1946 strike of engineers and trainmen and refused to man the emergency trains operated by railroad executives."[45]

Even newly organized so-called white-collar workers quickly accept the principle of mutual aid. Barbash reports that the newly organized telephone operators in Washington, D. C. refused to handle incoming or outgoing calls, "hot messages," from the strike-bound hotels in that city.[46]

During the organizational campaign directed at the Donnelly Printing Company in Chicago, which culminated in a strike, the printing trades unions all over the country conducted over a period of weeks what they called a "struck work" embargo to ensure that the company could not effectively farm out its work.[47]

Professor Haber, in his pioneering work on the building

[45] Barbash, *op. cit.*, p. 129.
[46] Ibid.
[47] *American Photo Engraver*, September 1945, pp. 812ff.; 833ff.

trades, discusses in detail the building-trade unions' rules prohibiting their members from working on materials manufactured under nonunion conditions. He concludes:

> "Union rules must be judged by some definite standard. To distinguish between rules which are regulatory and those which are restrictive implies the setting up of some standard of judgment—in short, an evaluation of the purposes of these rules. If one accepts unit costs to consumers as the dominant consideration, obviously his reaction to the union working rules will be different *than if he considers the protection of the workers' jobs and standards as the most important purpose.* Whichever standard one adopts, when one considers the economics of the building industry and its business and technical structure, *working rules are seen to be methods for justifiable protection of the workers mode of life and the bargaining power of his organization.* A vast majority of them are devices carrying into practice the things which the union is organized to defend." [48]

Unions contend that union members who are compelled to handle struck goods, or goods from a plant on an "unfair list", are acting as scabs and strikebreakers as surely as if they were going through a picket line; they become involuntary allies of the unfair employer in fighting their brother trade unionists. The union has a right to carry on such mutual-aid activities as will enable it to enlist the assistance of nonstriking union members to protect the standards of their fellow unionists. Indeed, unions argue, their members who refuse to handle the struck work or who refuse to work with nonunionists have a direct personal stake, since the maintenance of union conditions is indivisible; union conditions in one plant depend on the maintenance of union conditions in every other plant.

The employer who is engaged in a dispute with a union is perfectly free to ship his goods from the strike-bound

[48] William Haber, *Industrial Relations in the Building Industry.* Harvard University Press, (1930) p. 236. Emphasis supplied.

plant to another plant, the union people argue. Why shouldn't the union be equally free to try to persuade the employees in the other plant not to work on the struck goods?

By providing an outlet for the product of the unfair employer, or by otherwise handling it, such an employer inescapably becomes an ally of the employer engaged in a labor dispute and enables the latter to maintain the working conditions against which labor is protesting.

Here there is no "conscription of neutrals", so to speak. The members of the local union involved have a direct, definite, and recognizable economic interest at stake in the working and employment conditions prevailing at the unfair firm. By refusing to handle the goods of the nonunion firm, they are promoting economic interests of their own.

II. The "Hot Cargo" Principle is Consistent with Promotion of an Adequate Transportation System in Accordance with the National Transportation Policy

The national transportation policy as enunciated by the Congress of the United States in the Interstate Commerce Act states:

> "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as . . . to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation. . . . and to encourage fair wages and equitable working conditions . . ."[49]

The "hot cargo" clause contributes to the development of an adequate transportation system and its maintenance by localizing strikes and labor disturbances in the transportation industry. The "hot cargo" clause localizes a labor dispute by limiting the employer's ability to conscript neutrals.

[49] 49 U.S.C., Preceding paragraph 1, 301, 901, & 1001; September 18, 1940.

to haul his freight by the device of farming out his work. It prevents a strike that is taking place in one locality from spreading and becoming a strike in the entire motor freight transportation industry.

By means of a "hot cargo" clause voluntarily agreed to by motor carriers and their employees, union members may refuse to handle unfair products of a struck employer and thus not become "scabs" or strikebreakers, in keeping with traditional union practices.

The only available recourse other than to aid in strikebreaking is to strike and this would spread from one carrier to the next and possibly throughout an entire area. This necessarily follows because no self-respecting union man can be expected to "scab" on fellow unionists, nor to aid and abet strikebreaking by passing union picket lines and handling unfair goods, or by entering a strike-bound plant.

> "There are certain basic tenets of unionism, a knowledge of which can be reasonably charged to all employers. As pointed out by counsel for the union at the hearing, one of the cardinal principles of unionism is that a union will not permit itself to be used as a means of breaking the strength of another union which at the time is out on strike.
>
> "The 'sanctity of picket lines' is basic in the teaching and practices of American unionism." [50]

To the same effect, the National Labor Relations Board states:

> "It is almost a rule of trade union ethics for one labor union to respect a picket line established by another. Even unions affiliated with rival national labor organizations not infrequently adhere to this rule." [51]

Through the "hot cargo" clause, a carrier who is not involved in a labor dispute may insulate himself against

[50] Wayne L. Morse, Arbitrator—Encinal Terminal Case. Award of March 2, 1939. 4 LRR Man 1117.

[51] L. A. Young Spring & Wire Co., 70 NLRB 868 (1946).

involvement in some other carrier's labor dispute, thus expediting the prompt and efficient delivery of freight. In this manner, the "hot cargo" clause assists the Interstate Commerce Commission in fulfilling its responsibility to promote "efficient service" and to assure that the national transportation system does not break down.

The public suffers less injury through the use of "hot cargo" clauses than from a legally sanctioned strike.

All strikes involve economic losses. They are costly to all groups in the community. A strike results in a complete shut-down. As a result, there is a total economic loss caused by non-production. *A strike and its attendant losses radiate widely through our economy.*

Refusal to handle unfair goods, on the other hand, is directed solely against an individual employer, and then only with respect to the particular unfair product or service. The only requirement is that the "neutral" employer cease handling products of employers engaged in the primary labor dispute. The "neutral" employer is otherwise fully free to pursue normal business practices and continue doing business with any firm other than the one involved in the labor dispute.

If "hot cargo" clauses are banned or made ineffective or inoperative, both unions, employers, and the public would be placed at a disadvantage, since strikes would become necessary. "Hot cargo" clauses, therefore, tend to limit the use of strikes and eliminate the necessity of striking all employers. In this respect, they are "a substitute for the strike."[52]

It can therefore be seen that the impact of a strike on "efficient service" and "sound economic conditions in transportation"—essential components of "the national transportation policy of the Congress"—is much more severe and injurious than the use of "hot cargo" clauses. When

[52] Encyclopedia of the Social Sciences—*Boycott*, vol. 2, 1930, p. 663.

these objectives are added to another tenet of Congress' national transportation policy, namely, "to encourage fair wages and equitable working conditions" the use of "hot cargo" clauses becomes the more understandable and supportable.

Congress has been made aware of "hot cargo" clauses but has refused to legislate against them. As recently as 1954, Congress had before it a bill (S. 2989) designed explicitly and specifically to outlaw "hot cargo" clauses. The bill was discussed on the floor of the Senate, but was tabled without further action, thereby leaving them within the scope of protected activity.[53]

In conclusion, therefore, "hot cargo" clauses do not impede the Interstate Commerce Commission in its function of assuring minimum disruption to our national transportation system; they are consistent with Congress' statement of transportation policy, and to a far greater extent than strikes, they support the Interstate Commerce Act's declaration of policy on avoiding interruption of employment.[54]

III. Modification or Nullification of "Hot Cargo" Clauses Would be Injurious to Unions, Fair Employers, and the Public

The well-being of society in general depends upon the economic conditions and purchasing power of workers. If this is true, then labor must be permitted to use every available legal weapon to insure success, especially for purposes of organization. And as has been shown, the "hot cargo" clause is essentially an organizational device.

To nullify the peaceful use of the "hot cargo" clause, voluntarily agreed to by employers, deprives organized labor of a human right guaranteed by the federal constitution as well as by many of the state constitutions.

If employers are permitted the lockout weapon, labor

[53] Congressional Record, May 6, 1954, p. 5792.
[54] U. S. Code, title 49, preamble to paragraph 201.

is in need of equally strong counter-tactics such as the "hot cargo" clause.

It is often impractical or impossible to establish decent work standards save by pressure brought to bear upon those who deal with or take over the work of an unfair employer. Many of the so-called neutral or secondary employers are directly interested in a labor dispute by accepting work during a strike from a struck employer. When such action occurs, the "neutral" employer directly aids the primary offender to defeat the union and hence ceases to be a disinterested party.

Unionism, as an institution designed to achieve and maintain higher than open market standards of employment, cannot exist as long as competing non-union labor remains available. The refusal to handle unfair goods, therefore, becomes necessary against employers who operate under sweatshop conditions, selling upon a competitive market with other employers whose employees have been organized.

A. The "Hot Cargo" Principle Helps Strengthen Unionism and Collective Bargaining

No extensive documentation is required to demonstrate that public policy approves and encourages collective bargaining; that unionism and collective bargaining are socially desirable. The concluding paragraph of the findings and policies of the Labor Management Relations Act, 1947, reads:

> "It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and

conditions of their employment *or other mutual aid or protection.*" [55]
(Title I, Sec. 101, Sec. 1)

Although the Act does not directly encourage organization of employees, such encouragement is the end result. And in this country, employee organization and collective bargaining operate through trade unions.

As a necessary corollary to the development of collective bargaining, unionism must be given an adequate opportunity to spread to non-unionized firms, industries and geographic areas if the process of industrial self-regulation is to spread.

The business of a trade union is to protect the living standards of its members. In a market economy where competition prevails, this means that the union must make perpetual war on the tendency to treat labor as a commodity, that is, to pay it a price determined solely by the law of supply and demand. Only by controlling all the jobs in an industry and achieving uniform wages, hours and working conditions can it remove labor from competition.

Unless local unions of a national union band together to protect the standards they have separately established, they are exposed to the unregulated force of competition and are eventually destroyed:

> "Local unions checked the degradation of their members and won minor concessions; but they were ineffective in bringing about major reform. It was not the hard hearts of employers that proved the chief obstacle, but the nationalization of the market meant that owners had to manufacture as cheaply as their competitors in order to survive. The amount a successful employer could pay his workers was largely determined by the wage paid by the cheapest producer in the industry." [56]

A union cannot survive by organizing an isolated mem-

[55] Emphasis supplied.
[56] Jonathan Philip Grossman, *William Sylvis, Pioneer of American Labor*, Columbia University Press, 1945, p. 26.

ber here and another somewhere else. Its survival is largely dependent upon its control of the market. If non-union establishments are permitted to flourish, union establishments normally cannot meet market competition. The classic example is the old case of *Duplex* v. *Deering* (254 US 443).

If collective bargaining is desirable and strikes are reasonable means of securing and defending it, so also is the allied principle of refusing to work on unfair goods. "Hot Cargo" clauses are one of the decisive weapons which unions utilize (or hold in reserve) to give meaning to collective bargaining.

If employers are justified in refusing to deal with unions and pay union wages, union members are justified in refusing to work on or handle goods produced or transported against their own interests. Using the *Bedford Cut Stone* case as illustration, Berman stresses the touchstone of collective bargaining as a matter of social policy:

> "Even if one assumes that the contractors were injured by the refusal of the stone cutters to install non-union stone, it still seems reasonable to conclude that collective bargaining was sufficiently important socially to justify the imposition of such an accidental injury."[57]

Within the framework of our national labor policy which supports the principle of collective bargaining, Witney spells out the following conditions which warrant use of the "Hot Cargo" technique:[58] (1) "To advance or to protect the economic welfare of union members," for example, "if employers are . . . free to subcontract struck work." (2) To aid employees "in the winning of strikes carried out for lawful objectives. Any other policy guarantees to employers the right to operate struck facilities without fear of peaceful economic reprisal." (3) To eliminate non-union competition. "In a highly interdependent and competitive

[57] Berman, *op. cit.* p. 258.
[58] Witney, *op. cit.* pp. 445-446.

economy, union standards are threatened by the existence of non-union firms. Employers of organized firms just as union members are benefitted by the organization of non-union firms. Non-union employers should not be protected from organization by government fiat."

Organization of the unorganized worker has been a prime objective of "hot cargo" clauses. This is recognized by Wolman, who writes that "When, therefore, the ordinary methods of organization have failed, or are at the outset seen to be inoperative, the union must devise a supplementary resource", which is the refusal to handle "the products of unfair firms."[59]

Professor Gregory also characterizes the "hot cargo" principle as "essentially an organizational device."[60]

Use of the "hot cargo" principle is valid even with respect to establishments where the union has no members, according to Gregory, because the union has a real economic interest in organizing such an enterprise:

> "For all units in a particular industry are presumably competing with each other and selling their goods in the same markets. And assuming that employment standards are higher and constitute a larger portion of overhead costs in the unionized, as against the non-union, units in the industry, then it becomes apparent that all non-union units have a competitive advantage over the unionized units, due to the wage and other labor standards differentials existing between them. Under such competitive conditions, the non-union units may in time dominate the market for the industry's products by underselling the organized units. This, of course, would hurt the unionized employers. Moreover, it would adversely affect the organized workers, since it is plain that a union can thrive in a competitive industry only if the units within which it is established also prosper."

[59] Wolman, *op. cit.*, p. 18.

[60] Gregory, *op. cit.*, p. 124.

B. The "Hot Cargo" Principle Eliminates Unfair and Injurious Competition within the Trucking and Other Industries and is Accepted by Employers

A union which, through peaceful means, achieves extensive unionization and secures uniformity of conditions protects fairminded employers from "cut-throat competition." If an industry is thoroughly unionized, every employer can tell precisely what his competitors are paying in wages. The same shop rules also apply in all union establishments. Uniformity in competitive conditions is secured.

On the other hand, partly organized industries result in shocking waste and hardship to employers. Even the aggressive, honest, and efficient employer in a partially organized industry, if unionized, may well face disaster in competing with non-union employers.

Those employers who are placed at a competitive disadvantage inevitably try to equalize their wages and working conditions with those of their competitors. The impact on industrial peace and on decent and humane standards of work needs no detailed exposition.

Uniform working conditions protect one employer against another, protect the fair employer from the chiseler, and above all, assure stability of industrial operations, so far as wage costs are concerned. The fair and efficient employer is thus enabled to use all his organizing ingenuity in the layout of his plant, in the equipment and machinery used, in the purchase and selection of raw materials, in financial management, in the selection and utilization of his labor force, and in the sale of his product, and to take the risk of profit or loss based on his own ability without being burdened by unfair competition by employers who pay less-than-standard wages. This is of fundamental importance to most employers.

The only weapon against cut-throat wage competition and break-down of standards is union organization. This

is specifically recognized in our basic labor relations statutes. The Labor-Management Relations Act of 1947, in Section 101, Findings and Policies, states that the lack of organization among the workers to maintain an equality in bargaining power impairs interstate commerce "by preventing the stabilization of competitive wage rates and working conditions within and between industries." Similarly, the New York State Labor Relations Act of 1937, asserts that denial to the workers of the right to organize and bargain collectively "creates variations and instability in competitive wage rates and working conditions within and between industries."

The only way to make unions effective and to promote industrial stability is to extend unionization to as many employers and employees as possible, and over as wide an area as possible. Particularly in industries with many small firms, and where wages comprise a substantial proportion of the sales or revenue dollar, stabilization and fair wage competition will not take place unless the industry is virtually completely organized. Refusal to handle unfair goods, through "hot cargo" clauses, is one way of achieving such organization:

Employers *do* have an interest in standardization of wages and conditions of work and therefore, the unionization of their competitors.

> "An employer's competitive position in his industry is naturally affected by differences between the terms of his collective bargaining contract and the conditions of work maintained by his competitors, whether under contract or not." [61]

The factor of competition in the product market is recognized by labor arbitrators in adjudicating wage cases:

> "The American economy once again has become competitive. . . . Now it is of crucial importance to such a

[61] U. S. Department of Labor, Bureau of Labor Statistics, *Collective Bargaining Provisions: Preamble, Scope of Bargaining Unit, Duration of Agreements*, Bulletin 908-19, p. 22.

> firm that it be able to maintain at least a rough equivalence of labor and other costs with its competitors. In default of maintenance of such an equivalence, its markets, and the jobs of its workers, will be in jeopardy." [62]

Note also the following illuminating comment:

> "Even when the economic reason for organizing competitive firms is not very apparent, union negotiators find themselves in a difficult psychological bargaining position with unionized employers who tax the union with its inability to impose union conditions over the whole industry." [63]

As a result, unions are often required to pledge contractually to obtain uniform wages and working conditions throughout the industry or area.[64] An illustration from the printing industry is cited below:

> "Throughout the entire period 1899-1939, the pressures arising from the growth of an intercity market in book and job printing have exerted themselves in many corners of the field. Consequently, a literature of employers' protests has grown up, centering about the labor cost factor which bulks large in commercial printing. The demand is voiced that the variations in wages, hours, and working conditions in competitive areas be made more uniform. The Syracuse Agreement of 1898 entered into by the United Typothetae of America and the I.T.U., International Printing Pressmen and Assistants' Union, and International Brotherhood of Bookbinders, *provided that the signatory international unions would seek to equalize union rates in competitive markets* in return for a reduction in hours in the shops of the master printers." [65]

Actually, some employers in highly competitive industries have welcomed unionization of the entire industry. Cut-throat competition is always undesirable to employers

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[62] Champion Aero Metal Products and United Electrical Workers, 7 LA 283 (1947). See also Heywood Narrow Fabrics and Textile Workers, 6 LA 14 (1946).

[63] Barbash, *op. cit.*, p. 16.

[64] Bulletin 908-19, *op. cit.*, pp. 22-23.

[65] Jacob Loft, *The Printing Trades*, Farrar and Rinehart, Inc., 1944, pp. 10-11. Footnote in original deleted. Emphasis supplied.

and the union can aid in stabilizing the industry and policing it. Employers are willing to assist the union in this role. For example, in the Central Competitive Field Agreement of 1898 in the bituminous coal industry,

> "The union agreed to give employers who were members of the Agreement all possible protection 'against unfair competition resulting from a failure to maintain scale rates' of the wages agreed upon. In order to enable the union financially to apply the strike weapon against operators who refused to pay the wage scales, the employers undertook to deduct union dues from wages if authorized to do so by individual miners." [66]

Another illustration of employer assistance to unions' efforts to extend unionization dates from the early 1900's. The National Civic Federation, an employers' association which functioned in the early 1900's extended aid to unions by inducing employers and employers' associations to negotiate with trade unions.[67]

Whether or not the pledge to secure uniform standards is explicitly spelled out in a contract, this is a basic union objective which union employers view sympathetically. Employers have sound economic motivations for agreeing to "hot cargo" clauses—they wish to minimize competition from non-union firms:

> "One could almost say that an employer in a stable or contracting industry with highly fluctuating profits has mainly two concerns in the field of labor relations: (1) to save his plant from Unionization, or (2) if he has failed to do so, to see that the plants of his competitors are also unionized. In such indusfries employers have often been forced to abandon desirable personnel policies with regard to wages and working conditions simply under competitive pressure. In good times they have been reluctant to grant wage increases because

[66] Otto Pollak, *Social Implications of Industry-Wide Bargaining*, University of Pennsylvania Press, 1948, p. 9. Footnotes in original deleted.

[67] *Employers' Associations.* In Encyclopedia of the Social Sciences, The MacMillan Company, 1931, vol. V, p. 511.

> they feared that competitors would not do likewise and thereby gain a competitive advantage. In bad times employers have been forced to reduce wages to the level of their weakest competitors in order to retain their competitive position. *In the 1930's employers actually emphasized the need for industry-wide wage policies in order to provide insurance against competitive upsets.*" [68]

George Taylor also refers to employers' cooperation with unions in achieving standardized conditions within the industry:

> "Acceptance of collective bargaining by an employer means in these terms that management is willing to 'go along' and cooperate with the union in developing union security and standardized conditions of employment within a plant *and between competing plants.*" [69]

During World War II, the New York Regional War Labor Board (Regional Board II) recommended in a dispute case, that the parties include the following "Hot Cargo" clause *proposed by the company:*

> "The Company shall not cause the employees to work on rubber and paracord products which may be sent to the factories from another rubber plant where the employees have been organized by the USWA and where a strike exists, provided notice of such strike is given to the employer by the union by registered mail, postage prepaid." [70]

The union in this case had proposed a provision which would permit the employees to decline to work on any product received from or going to an employer whose employees are on strike.

The only protection afforded the employer who pays union wages against sweatshops or underpaid labor com-

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[68] Pollak, *op. cit.*, pp. 7-8. Footnotes in original deleted. Emphasis supplied.

[69] George W. Taylor, *Governmental Regulation of Industrial Relations*, 1948, p. 63. Emphasis supplied.

[70] In re *Endicott Johnson Corporation* and *United Shoe Workers of America, Local 83 (CIO)*, Case No. 111-12557-D, May 1, 1945. Bureau of National Affairs, 24 War Labor Reports 332.

petition has been the power of the union to refuse to handle goods produced by such substandard labor. The "hot cargo" technique gives a measure of protection to the *employer* of union labor, as well as to the wage standards of his employees.

The union employer and employees have no legal protection other than this organized resistance. If the low-wage employer is protected against such union action, the end result is inevitable. The employer who pays higher wages cannot possibly survive if his product reaches a market in competition with a competing product produced at a substandard wage. This is not theory. It is industrial history and economic fact. We are all familiar with the "runaway shop."

Inability to apply "hot cargo" clauses negates effective union resistance to unfair standards. Thus, for the benefit of the non-union and low wage employer, fair employers and union workers are disadvantaged. The result of such competition is ruination of wages and living standards for both groups of workers.

Fair employers understand and recognize this state of affairs. For example, in the fall of 1912 a protocol was tentatively negotiated with an association of employers controlling one-fourth of the New York dress and waist trade, *upon condition that the majority of the industry be organized.* In the meantime agitation for a general strike was kept up among the workers. The members of the association not unnaturally wanted the standards of their competitors raised along with their own, *and agreed to have their shops included in the strike,* with an understanding that their workers would return to their jobs as soon as the agreement was signed. The strike was called January 15, 1913, a protocol was signed three days later, and on the 20th, the workers in the association shops were sent back to work.[71]

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[71] Joel Seidman, *The Needle Trades,* Farrar & Rinehart, Inc., New York, 1942, p. 110.

This incident reveals clearly the direct interest of organized employers in the extent of unionization in their industry and their assistance to unions in furthering organization.

This also explains why some unionized employers have actively supported the principle of higher statutory minimum wages. For example, at the 1947 Congressional hearings on increasing the minimum wage, various industry spokesmen, representing unionized firms, testified in support of a higher minimum. Among the reasons cited were that non-union competitors would be most affected by a higher minimum, which was already being paid in union plants;[72] that "it would help stabilize the industry";[73] and that minimum uniform standards—in this case achieved through a statutory minimum wage—act as a constructive, stabilizing force in the industry, primarily because they "*prevented disemployment among the more progressive segments of business, those segments determined to pay decent wages.*"[74]

The following discussion emphasizes fair industry's concern with unfair competition:

> "Mr. (Cong.) Fisher: You frankly put it, to some extent, at least, on the basis of relieving some of the hardships or disadvantages that may result in competition.
>
> "Mr. Rabbino: What I consider unfair competition; yes."[75]

I have referred to the employer's interest in wage equality with his competitors and to his concern with their unionization. The classic case of *Duplex Printing* v. *Deering* involved this situation: Of the four printing-press manu-

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[72] *Minimum Wage Standards*, Hearings before Subcommittee No. 4 of the Committee on Education & Labor, House of Representatives, 80th Congress, 1st session on H.R. 40, et al., vol. 1, pp. 608; 624-625.

[73] Ibid., vol. 3, pp. 1644, 1650.

[74] Ibid., p. 1659. Emphasis supplied.

[75] Ibid., p. 1662. See also discussion by Patrick W. McDonough, President, McDonough Steel Co., Oakland, Calif., p. 1627, et seq.

facturers in the country, three were union and one was unorganized. When the contracts with the three organized employers expired, the union was informed that their employers would prefer to maintain union standards but could not do so in the face of the competition of the fourth, the unfair employer. Thus, in order to preserve the gains they had made, the union called upon its fellow members in New York and elsewhere not to install or work on the unfair printing presses.

A Supreme Court majority found such action to be an unlawful boycott. However, Justices Brandeis and Holmes spoke out in sharp and compellingly persuasive dissent (254 U. S. 443, 481, 482). They said:

> "May not all with a common interest join in refusing to expend their labor upon articles whose very production constitutes an attack upon their standard of living and the institution which they are convinced supports it? . . . Courts, with better appreciation of the facts of industry, recognized the unity of interest throughout the union, and that, in refusing to work on materials which threatened it, the union was only refusing to aid in destroying itself."

Stabilization in the Trucking Industry by the Teamsters' Union

With respect to the trucking industry, the competitive structure of the industry calls for standardization through unionization. Without the union, cut-throat methods prevail. Employers are so numerous and have such diverse interests that they have not been able to form a single trade or employers' association covering the whole industry. Competition, unless restrained and regulated, would lead to wage- and rate-cutting. Consequently they have been unable to "stabilize" the industry without the assistance of the Teamsters.

The "legitimate" unionized trucker, whose employment conditions are fair, is constantly endangered by the opera-

tions of his non-union competitors. What can he do about it? The union comes to his rescue by enforcing uniform conditions on all employers, big and small, fair and unfair, efficient and inefficient. The wage scale, working conditions, overtime regulations, and other rules which enter into the employment problem are enforced equally upon all.

Widespread unionization through the Teamsters Union over the area of competition raises the plane of competition by standardizing those elements which make up the money cost of labor.

The Teamsters' collective bargaining policy, in terms of objectives, principles, and methods, is designed to be uniform for the "industry" as a whole:

> "Bargaining in the trucking industry is not a union monopoly, in the sense of a device to restrict the labor supply or drive up the price of labor, or a two-sided monopoly, in the sense of a mutual device to limit employment and output and push up wages and prices at the expense of the consuming public. It is, however, conducted with a view to taking labor costs 'out of competition,' i.e., to achieving uniformity in the direct labor costs of competing firms." [76]

An astute observer notes that one force pervades collective bargaining relationships in the trucking industry; namely:

> "The pressure for establishment of uniform wages and conditions of employment." [77]

The International Brotherhood of Teamsters has provided such a stabilizing force, only because it is extending unionization throughout the industry. The president of the association of local truck operators throughout the United States comments:

> "No other single element or combination or association exerts such influence toward stability in our industry." [78]

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[76] Feinsinger, *op. cit.*, p. 38.

[77] George W. Taylor in Preface to Nathan L. Feinsinger, *Collective Bargaining in the Trucking Industry*, University of Pennsylvania Press, 1949, p. iii.

[78] Quoted in Feinsinger, *op. cit.*, p. 36.

Similar testimony is reported by *Newsweek*, which states that the Teamsters' Union "has brought stability to the industry." [79]

Only by using such tools as the "hot cargo" clause has the union been able to carry out its function of promoting "fair industry practices and rules which no other instrumentality in the field has been able to accomplish." [80]

This conclusion is also the view of the author of the only study dealing at any length or in any depth with the problems of collective bargaining in the trucking industry:

> "In conclusion, it must be said that the union has done an efficient job of organizing the employees of this industry and has succeeded in materially increasing their wages and improving their conditions of labor. There was great need for a union in this industry, because prior to the formation of the union, intense competition had forced wages to a low level and hours of labor to excessive lengths. Conditions of labor were also bad. It is probable that the employees of this industry, characterized as it is by severe competition and small use of capital, will always need a union to protect the standards of wages and working conditions which they possess at the present time. If the industry develops into one composed of a few large units, the need for a union may not be so great, because competition would probably be less keen, but the need would nevertheless exist for some organization to represent employees in negotiations with employers. If such an organization did not exist, it is probable that, even with only a few large-scale enterprises, wages would tend to decline, hours would increase, and working conditions would become less favorable.
>
> "*Employers will find it to their advantage to continue to have a union, because it is the only way in which employers can eliminate as an item of competition, the large part of total cost composed of labor cost.* It is probable that the employers will also find it true that unionism will lead to better relations with

[79] *Newsweek*, May 14, 1956, p. 33.
[80] Feinsinger, *op. cit.*, p. 36.

employees and that it is a method of maintaining employee morale which cannot be duplicated by any other device."[81]

Because of the nature of the trucking industry, the Teamsters' Union has a special problem in organizing which makes use of the "hot cargo" technique imperative. Users of trucking services rarely come to the truck terminal for purpose of employing the trucker's services. Rather, the trucks must go to the premises of the customer in order to pick up or deliver merchandise. Practically, then, economic pressure can be effectively applied against an unfair or non-union trucker only at the point where the business is actually done, namely, where a pickup or delivery is made. It is there that the Teamster member or local union must appeal for the aid and assistance of fellow workingmen. And this is why it was necessary to develop and apply the "hot cargo" clause for the trucking industry.

Again, since one truck line often interlines with another whose terminals may be far distant, the only practical method of using economic pressure, other than picketing, is through the use of the "hot cargo" clause.

Because Teamsters include dock workers as well as drivers, its members daily come into contact with non-union drivers (or dockmen) who jeopardize their own security and that of the fair firm by whom they are employed. Even though open warfare does not occur, the inherent antagonism between the two groups, union and non-union, causes constant friction, bringing about lowered morale, increased cost and much industrial unrest. Small wonder, then, that many unionized firms dealing with the Teamsters Union voluntarily agree to "Hot Cargo" clauses to minimize such unrest.

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[81] Samuel E. Hill, *Teamsters and Transportation, Employee-Employer Relationships in New England.* American Council on Public Affairs 1942, p. 235. Emphasis supplied.

IV. The "Hot Cargo" Principle is Recognized Extensively Throughout American Industry

The refusal of union men to work on non-union materials or on materials handled by non-union workmen has been observed down to the present day—as a matter of basic union principle often incorporated in union constitutions and by-laws; as a matter of practice; and as a right incorporated in the form of "hot cargo" clauses in collective bargaining contracts.

"Hot cargo" clauses are widespread. They occur in a large variety of industries; they are negotiated by many unions, craft and industrial, those covering manual workers as well as those covering office, technical and professional employees. They are found in manufacturing, non-manufacturing, transportation, communication, technical laboratories, etc.

The Bureau of Labor Statistics has, for many years, analyzed union contracts in a variety of indusfries or reprinted copies or extracts of such agreements. In the period 1923-1927, the Bureau published four bulletins on "Trade Agreements" (Bulletins 393, 419, 448, and 468) in which it discussed the terms and provisions of collective bargaining contracts current at that time and reproduced many contracts, in whole or in part.

The agreements included many references to unfair, non-union or struck goods clauses. In its subject index to the four bulletins, the Bureau classified such clauses in the categories shown in the table below, which also lists the number of clauses included in each category:

Number of References to Unfair, Non-union or Struck Goods Clauses in Collective Bargaining Contracts, 1923-1927 [82]

[82] "Trade Agreements, 1927", Bulletin No. 468, Bureau of Labor Statistics, U. S. Department of Labor, (December, 1928). Cumulative Index to Trade Agreements, Subject Index, pp. 218-237.

Type of Provision	*Number of Clauses*
Non-union goods not to be used	7
Furnishing goods to a struck shop	20
Refusal to execute struck work	18
Unfair firms, goods, and jobs	14
Union-made materials: Use required	7

The text of these provisions is to be found in Appendix A. The unions represented in this group include the Meat Cutters, Bakers, Stone Cutters, Laundry Workers, Sheet-Metal Workers, Granite Cutters, Plasterers and Cement Finishers, United Cloth Hat and Cap Makers, Ladies' Garment Workers, Amalgamated Clothing Workers, Bookbinders and Bindery Women, Paper Cutters, Machinists, Fur Workers, Pocketbook Workers, Typographical Union, Printing Pressmen, Stereotypers and Electrotypers, Teamsters, Photo-Engravers, Street and Electric Railway Employees, Pressmen's Union, Lithographers, Brewery Workers, Carpenters, Painters, Hotel and Restaurant Employees, Cleaners, Dyers and Pressers, Broom and Whisk Makers, Paving Cutters, and United Wall Paper Crafts.

The type and extent of "hot cargo" clauses in agreements in 10 industries studied by the Bureau of Labor Statistics from 1935 to 1945 is shown below. The industries are baking, building trades, brewery, electrical equipment and radio manufacturing, shoe, rubber, newspaper publishing, shipbuilding, leather tanning, and tobacco.

(Based on analysis of 175 Bakery agreements in files of Bureau of Labor Statistics)

> "Eight agreements provide that the employer shall not ask any union man to cross a picket line, and a considerable number require the employer not to furnish baked goods to any shop at which a strike or lock-out is in progress."

SOURCE: Bureau of Labor Statistics Bulletin No. 673,

"Wages, Hours, and Working Conditions in Union Bakeries," June 1, 1939, p. 15.

* * *

(Based on analysis of 854 Building Trades agreements in files of Bureau of Labor Statistics)

". . . the plumbers and steamfitters may not sign an agreement containing a clause which prohibits sympathetic strikes; . . ."

SOURCE: Bureau of Labor Statistics Bulletin No. 680, "Union Wages, Hours and Working Conditions in the Building Trades," June 1, 1941, p. 35.

* * *

(Based on analysis of 82 Brewery agreements in files of Bureau of Labor Statistics)

"Among the other provisions in these agreements is the usual requirement that union materials and machinery be given preference. In some cases only union-made malt and syrup may be used."

SOURCE: Serial No. R. 379, Monthly Labor Review, April 1936, "Collective Agreements in the Brewery Industry, 1935," p. 8.

* * *

(Based on analysis of 120 agreements with United Electrical, Radio and Machine Workers' Union, covering electrical equipment and radio manufacturing plants and machine shops, on file with Bureau of Labor Statistics)

"A number of agreements prohibit their members from working on contract jobs for companies where workers are on strike. Also, members of the union are not required to work when other employees of the company are on strike. The latter provision applies to shops where the Electrical, Radio and Machine Workers cover production employees and highly skilled craftsmen are members of other unions."

SOURCE: From Monthly Labor Review, July 1938, Serial No. R. 779, "Collective Bargaining by United Electrical, Radio and Machine Workers," p. 8.

* * *

(Based on analysis of 20 Shoe Workers agreements in files of Bureau of Labor Statistics)

"A large majority of the agreements provide that the

union may refuse to work on material coming from an employer against whom a strike has been called, or who lets out home work, or (less frequently) from a factory not in contractual relationship with the United Shoe Workers. A large number prohibit home work or the sending out of work by the employer with whom the contract is made, except where lack of factory facilities makes it necessary, and then only with the permission of the union."

SOURCE: From Monthly Labor Review, November 1938, Serial No. R. 843, "Collective Agreements of the United Shoe Workers," p. 3.

* * *

(Based on analysis of 54 Rubber Workers agreements in files of Bureau of Labor Statistics)

". . . the extension of the union's bargaining power for the aid of employees in other plants is established in one case by a clause which prohibits the company from aiding or abetting any firm in which a legitimate labor dispute is in progress."

SOURCE: Serial No. R. 1000, from Monthly Labor Review, September 1939, "Collective Bargaining by United Rubber Workers," p. 3.

* * *

(Based on analysis of 78 Guild agreements in files of Bureau of Labor Statistics)

"Approximately one-fourth of the agreements prohibit Guild members from handling work for shops on strike. In some cases, the provision is to apply only if the publisher is a direct party to the strike. Six agreements specifically state that no employee may be required to take over the duties of any employee in another department in the event of a strike nor to work in any department of another newspaper where a labor dispute exists."

"In five agreements Guild members are not required to pass through picket lines formed by other unions as a result of a labor dispute at the newspaper plant. In two of these cases, recognition of the picket line first must be ordered by the Guild's executive board after consultation with the publisher."

SOURCE: Serial No. R. 1102, from Monthly Labor Review, April 1940, "Collective Bargaining by the American Newspaper Guild," p. 13.

* * *

(Based on analysis of 28 agreements in Shipbuilding which were on file with Bureau of Labor Statistics)

"Several of the agreements specify in detail the various kinds of work stoppages which are prohibited. Four agreements, however, specifically give the union members the right to refuse to do struck work, one of these applying only to strike approved by the Metal Trades Council. Three other agreements give employees the right to refuse to pass through picket lines. On the Pacific coast, the A. F. of L. Metal Trades convention in February 1940 agreed that 'there will be no cessation of work because of any jurisdictional dispute which may arise.' To carry out this policy the unions agreed to ignore any picket line established in the course of a jurisdictional dispute."

SOURCE: Serial No. R. 1179, from Monthly Labor Review, September 1940, "Union Agreements in Shipbuilding," p. 14.

* * *

(Based on analysis of 40 agreements in the Leather-Tanning Industry which were on file with Bureau of Labor Statistics)

"About half of the agreements provide that employees cannot be forced to work on leather coming from or going to a struck tannery, provided the company has been notified of the strike. Moreover, in several agreements the company specifically agrees not to hire 'strike breakers.'"

SOURCE: Bureau of Labor Statistics Bulletin No. 777, "Union Agreements in the Leather-Tanning Industry, 1943," p. 19.

* * *

(Based on analysis of 16 agreements in Cigar Manufacturing Industry which were on file with Bureau of Labor Statistics)

"Four agreements prohibit employers from forcing em-

ployees to do work for another plant which is on strike."

SOURCE: Bureau of Labor Statistics Bulletin No. 847, "Union Agreements in the Tobacco Industry, January 1945," p. 25.

The New York State Department of Labor's analysis of Teamster contracts in effect on November 30, 1948 covering approximately 70,000 workers of 27 New York City locals reports:

> "A number of contracts, however, recognize the right of the workers covered to refuse to (1) handle goods involved in a labor dispute, (2) cross a picket line, (3) work with strikers, or (4) work if endangered by violence or threats of violence." [83]

In 1942, the Bureau of Labor Statistics issued a comprehensive report on union agreements, which contained a "comprehensive collection of illustrations of the various provisions of written agreements between employers and employees in the United States." [84] With respect to "hot cargo" clauses, the Bureau notes:

> "Sympathetic support by members of one union for organized workers in other plants or in other trades and industries often finds expression in union agreements. Any union looks upon nonunion conditions of work as a threat to its own union working standards. *Consequently it is often provided in agreements that the employer may not require employees to work on material coming from or destined for manufacturers not operating under union agreements.* Other agreements limit the prohibition to material coming from employers who have been declared 'unfair' to organized labor by an affiliated union. This reduces considerably the list of restricted manufacturers, since many employers who do not deal with organized labor have never been declared 'unfair' by union having nominal

[83] *Provisions of Teamsters' Union Contracts in New York City*, Division of Research and Statistics, Department of Labor, State of New York, Publication No. B-24, July 1949, p. 36.

[84] U. S. Department of Labor, Bureau of Labor Statistics, *Union Agreement Provisions*, Bulletin No. 686 (1942) p. VII.

jurisdiction. Another alternative merely prohibits work on materials coming from or destined for manufacturers whose employees are on strike. Agreements covering factory production workers may require that all building repairs and maintenance work as well as all hauling of goods and materials into and away from the employer's premises must be done by union workers."[85]

In a later publication dealing with Strike and Lockout provisions in union contracts, the Bureau wrote:

"The right of union members to refuse to handle or work on struck goods, or on nonunion or 'unfair' goods is recognized in many agreements. *Similarly, the employer may pledge not to do any work for, or not to handle any product of, a firm struck by the signatory or an affiliated union.* Some clauses state that the contract may be terminated if an employer requests union members to handle goods from a plant not under contract with the signatory union."[86]

Illustrative contract clauses taken from this publication, which deal with refusal to handle or work on unfair goods, are reproduced in Appendix B.

The Bureau of National Affairs, in its *Collective Bargaining Contracts* (1941), comments on and illustrates a variety of "hot cargo" clauses negotiated by different unions. See Appendix C.

"Hot cargo" clauses are not limited or restricted to small-scale industry or to craft unions. As shown in Appendix D, they also occur in the automotive and aviation parts manufacturing industry.

Such clauses also appear in contracts covering engineering employees (Federal Telecommunications Laboratories, Div. of ITT, Nutley, New Jersey; and Local 400, IUE, AFL-CIO, effective September 20, 1954); and employees in the broadcasting industry:

"It is interesting to note that in some segments of the

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[85] Ibid., p. 32. Emphasis supplied.

[86] U. S. Department of Labor, Bureau of Labor Statistics, *Collective Bargaining Provisions: Strikes and Lockouts; Contract Enforcement*, Bulletin No. 908 13, November 1949, p. 37.

radio industry the 'struck' work concept has been accepted in collective bargaining contracts. Some broadcasters and the American Federation of Radio Artists have agreed that employees should not be asked to furnish services to a struck employer in excess of those normally or regularly provided."[87]

Note also the following clause from an agreement between the Columbia Broadcasting System and technicians represented by the International Brotherhood of Electrical Workers:

"(c) No technician shall be required to air, record or otherwise handle any program or announcement on tape, film, wire, records, transcriptions or other media which is produced or processed in an establishment where a strike by the IBEW is in progress or which has been listed as unfair by the International Office of the IBEW. The terms of this subsection shall not apply to any such program material which was already on hand or produced prior to the commencement of such strike.

"(d) Nothing in this Agreement shall be construed to prevent or interfere with the feeding of a program or programs from CBS and/or any of the CBS stations covered by this Agreement to another station or stations where such action is pursuant to a contractual obligation entered into prior to the commencement of any strike. However, nothing in this Agreement shall be construed as obligating Technicians to accept for air purposes or otherwise handle a program or announcements in contravention of sub-Section (c) hereinabove."[88]

Examples of "hot cargo" provisions can be found in countless other industries. The record presented, however, adequately indicates the wide-spread occurrence of such clauses in current-day collective bargaining.

Analogous to union contract "hot cargo" clauses are the provisions in union constitutions which prohibit members

[87] Charles H. Tower, *A Perspective on Secondary Boycotts*, Labor Law Journal (Commerce Clearing House, Inc.) Vol. 2, No. 10 (October 1951) p. 738.

[88] Columbia Broadcasting System, Inc., and International Brotherhood of Electrical Workers, effective May 1, 1956, Art. I, Sec. 1.07 (c) & (d).

from working on unfair or nonunion goods or materials. Illustrative constitutional provisions on this point are included in Appendix E.

V. CONCLUSIONS

The right to refuse to handle unfair goods through the use of so-called "hot cargo" clauses agreed to in advance by the employer is a legitimate union technique to advance the union's interests through extended organization. The objective is to eliminate the differential existing between union and nonunion wages in the industry and to preserve wage standards and working conditions against deterioration and against the impact of wage undercutting by nonunion employers.

Justification for use of "hot cargo" clauses is based on the worker's economic self-interest and his right to protect his economic position in society by (a) not being compelled to participate in any activity designed to injure him, and (b) not being prevented from soliciting the support of others in an effort to protect his economic position.

The right of workers to organize for their mutual aid and protection suffers a severe setback when unions are deprived of a primary weapon—not only to withhold their services but to persuade other fellow workmen, members of the same union, to do likewise.

Strikes are not always successful. Employers are as free to gain support from other employers and the public as are unions to seek such support. Often in a strike, one employer "farms out" his struck work to other employers to produce his product while his workers are on strike.

Under these circumstances, labor often appeals to workers outside the struck plant not to lend their labor in handling the product—whether it be manufacturing, transporting or selling.

Of what value is the workman's organization unless it can

be used for his protection? If restricted in his assistance to fellow unionists, the organizational power and unity of his national union is torn to shreds; the protective shield over unionized standards is fractured.

Conditions for working people were won in the past only by labor's utilizing the united strength of large groups of unions supporting one another. This unity meant strength and protection for wage scales and working conditions.

The National Labor Relations Act states that workmen should have the right to combine for their "mutual aid and protection."

There is nothing which prevents one employer or group of employers acting singly or in concert, from rendering economic assistance to each other, providing such assistance is not for an unlawful purpose.

It is not an unfair labor practice for groups of employers to bring social and economic pressure on other employers to refrain from a certain course of dealing with labor unions. Courts have upheld the actions of employer associations in demanding that their members lock out all workers because one of their members was engaged in labor dispute. Such conduct on the part of employer groups comes within the sphere of permitted mutual assistance activity on their part.[89]

The following revealing comment by the president of the Southern Hosiery Manufacturers Association, Taylor R. Durham, of Charlotte, N. C., following the group's annual meeting at Roanoke, Va., on September 13, 1951 illustrates employer assistance to other employers:

> "An important function of the association is not covered by the report but was explained in a confidential session of the meeting and is mentioned here on the same basis. *We refer to the assistance given to milk*

[89] *Davis Furniture Co.* v. *NLRB*, 9th Circuit, San Francisco, June, 1953, 32 LRRM 2305.

where the union is making an effort to organize them, and while only a small part of the credit is claimed for the results during the year you will be interested to know that out of 13 elections since last September not a single one has been finally determined in favor of a union."[99]

Why then should working people be prevented from rendering the only effective form of economic assistance to each other which they are capable of giving?

Simple justice and equity should permit workers to attempt by all peaceful means to procure the cooperation of other union members in seeing to it that struck or unfair employers are not able to operate. Workers should have the positive right to engage in legitimate self-help and mutual assistance activities. It is neither reasonable nor equitable to withdraw from unions and only from unions (since employers are not similarly restricted) the right to engage in activities protecting themselves and their fellow union members.

The union can stabilize its established standards in the unionized shops only by insuring them against competition from nonunion mills.

Surely, there is no reason why union members should be compelled to be strike-breakers. A ban on "hot cargo" clauses forces workers, against their good judgment or choice, to abet the undercutting of wage standards in their trade, and to help undermine the standards established through collective bargaining, though these workers know full well that by doing so they inflict injury upon themselves, their fellow unionists, and fair employers.

Vitiating "hot cargo" clauses is worth untold millions of dollars to sweatshop or sub-standard employers who exploit labor.

In a free economic society, withdraw the right to refuse

[99] *Hosiery Worker*, official organ of the American Federation of Hosiery Workers, AFL, January 1952, Editorial. (Emphasis supplied).

to handle unfair goods, and unionism is illusory. *Trade unionism functions as much as a protection against the unorganized as it operates to bring benefits to organized workers.* Trade unionism by its very nature must expand and extend over the entire industry, in many cases despite the apathy of unorganized workers.

While it is the privilege of any worker to work for substandard or even starvation wages if he wishes, he has no right to impose the consequences of this privilege on his fellow workers. Unionists who, through many sacrifices, have achieved certain minimum standards vital not only to themselves but to the welfare of the whole community, have a morally greater right to seek to protect such standards against destruction.

It has been our national policy to eliminate competition in wage rates, not to foster competition in sweatshop conditions. It has been the objective of our national policy to prevent the kind of competitive advantages secured at the expense of workers. It has been our national policy to further the establishment of uniform standards of compensation, to further the concept of equal pay for equal work. It has been our national policy to insist that competitive advantages be based upon improvement in efficiency, in organization, in technology and all the other factors which go into progressive productive policy.

Denial of the self-help technique of refusal to handle the goods of an unfair employer who jeopardizes union gains and imperils fair employers through substandard conditions negates this national policy.

The primary object of "hot cargo" clauses is to extend union organization and to protect collective bargaining. Rendering such clauses ineffective weakens the collective bargaining process by denying a necessary economic tool to unions and by compelling them to contribute to their self-destruction. "In the dynamic field of industrial relations,

government must take care not to side with either management or the labor union during the time of economic conflict." [91]

A labor movement can never long stand still; it must grow stronger or weaker, and in a democracy, it must inevitably grow stronger. And a labor movement is all the stronger which accomplishes its growth through its own efforts. The "hot cargo" principle, which is at issue in this case, is a traditional union method of self-help, and its use is necessary and justified.

[91] Witney, *op. cit.*, p. 445.

APPENDIX A

ILLUSTRATIVE
UNFAIR, NON-UNION OR STRUCK GOODS CLAUSES
IN
COLLECTIVE BARGAINING CONTRACTS
1923—1927

SOURCE:

Trade Agreements, 1923 and 1924, Bulletin No. 393, Bureau of Labor Statistics, U. S. Department of Labor, September, 1925;

Trade Agreements, 1925, Bulletin No. 419, Bureau of Labor Statistics, U. S. Department of Labor, September 1, 1926;

Trade Agreements, 1926, Bulletin No. 448, Bureau of Labor Statistics, U. S. Department of Labor, July, 1927; and;

Trade Agreements, 1927, Bulletin No. 468, Bureau of Labor Statistics, U. S. Department of Labor, December, 1928.

UNFAIR FIRMS, GOODS AND JOBS

Brewery Local No. 293, Los Angeles, California, dated March 21, 1924:

> "... members of Local No. 293, Los Angeles, in section 11 of their agreement dated March 21, 1924, refuse 'to handle or bottle any product of any brewery that is declared unfair' by the union." BLS Bulletin No. 393, p. 13.

Extracts from various local agreements:

> "No contractor or employer shall ... require his men to work on any unfair job." BLS Bulletin No. 393, p. 26.

Painters Local No. 498, Jamestown, New York, dated April 1, 1925:

"Art. X. The refusal of members to work on a non-union or unfair job shall not be considered a violation of this agreement." BLS Bulletin 419, p. 46.

Hotel and Restaurant Employees Local No. 62, Fresno, California, dated May 8, 1925:

"XI. No member of Local No. 62 shall be required to handle, prepare, or serve . . ., the goods of any firm or corporation which has been declared unfair by the Fresno County Labor Council, nor to work with employees or any firm or corporation which has been declared unfair by the Fresno County Labor Council or the Fresno Building Trades Council." BLS Bulletin 419, p. 84.

Machinists Local No. 514, Duquoin, Illinois, dated 1925:

" . . . It shall be considered a violation of this contract to accept work coming from a struck shop or other shops unfair to organized labor." BLS Bulletin No. 419, p. 93.

Printing Pressmen's Local No. 3, Chicago, Illinois, dated March 27, 1925:

"The union reserves the right to its members to refuse to execute any and all unfair work destined to or from unfair employers." BLS Bulletin No. 419, p. 121.

Stone-Working Trades — Tool sharpeners' agreement with Granite Manufacturers' Association of Quincy, Massachusetts, April 1, 1925:

"Sec. 13. Members of the Quincy Granite Manufacturers' Association agree not to supply power or compressed air to any firm rated as unfair by Quincy branches, G. C. I. A., or to do any polishing for any such firm." BLS Bulletin No. 419, p. 141.

Cleaners, Dyers, and Pressers Union, Local No. 17834, Detroit, Michigan, March 22, 1926:

"Art. 11. Members of the union shall not be required

to work on orders placed by firms unfair to said union, and refusal of such members to work on such orders shall not be considered a violation of this agreement." BLS Bulletin No. 448, p. 68.

Meat Cutters and Butcher Workmen Local No. 115, San Francisco, California, August 26, 1927:

"Sec. 9. No member of this union shall be allowed to handle any fresh or cured meats coming from an unfair firm." BLS Bulletin No. 468, p. 101.

Photo-Engravers Local No. 19, Milwaukee, Wisconsin, January 2, 1927:

"4. It is further expressly agreed and stipulated that members of said Milwaukee Photo-Engravers' Union No. 19 employed by the party of the first part shall not be compelled to work upon or in completion of any work coming from an unfair shop. 'Unfair shop' shall be and is understood to mean one known or designated as 'open' or 'nonunion' or in which there is a strike or lockout of the members of the International Photo-Engravers' Union." BLS Bulletin No. 468, p. 140.

NONUNION GOODS NOT TO BE USED

Amalgamated Meat Cutters and Butcher Workmen of North America Local No. 1, Syracuse, New York, December 1, 1923:

"Art. 9. Union meat cutters will not be required to sell nonunion sausage products of any kind, the preference of purchase to be granted to local industry . . ., as far as practicable. This article proposed and adopted by the Master Butchers of Syracuse and accepted by this union in the interest of home industry." BLS Bulletin No. 393, p. 69.

Bakery and Confectionery Workers' Local No. 30, Syracuse, New York, May 1, 1926:

"Section 8. Lunch rooms and restaurants employing members of Local No. 30 and recognizing the union under the provisions of this agreement shall refrain

from using nonunion bakery goods in their respective business establishments, providing union-made bakery goods can be procured through recognized union bakeries under jurisdiction of Local Union No. 30." BLS Bulletin No. 448, p. 15.

Journeymen Stonecutters' Association of New York and Newark, January 1, 1926:

"Art. XI. There shall be no strikes, lockouts, or stoppage of work, but the union reserves the right to refuse to work either with nonunion men or on nonunion material." BLS Bulletin No. 448, p. 65.

Laundry Workers' Local No. 207, Detroit, Michigan, March 15, 1926:

"XIII. The union hereby reserves the right to refuse to execute 'struck' work, washed at steam laundries where strike-breaking labor is being employed, and also the right to join a general strike in the event such a strike is called." BLS Bulletin No. 448, p. 92.

Sheet-Metal Workers' Local No. 263, Cedar Rapids, Iowa, April 1, 1926:

"Art. 4. No journeyman shall be requested by the Employer or permitted by the union to erect any manufactured articles, such as gutters, furnace fittings, finals, ventilators, cornices, skylights, valley tin, etc., unless they bear the union label; except such articles or ornaments as are patented and specified by an architect and such goods as the general run of the shops are in no position to manufacture.

"Art. 16. No journeyman shall work on any job that has been declared unfair by the Cedar Rapids Building Trades Council or council under whose jurisdiction he may be working." BLS Bulletin No. 448, p. 107.

Granite Cutters' International Association, Chicago, Illinois branch, April 1, 1927:

"Sec. 27. The Chicago branch reserve his right not to cut granite coming from nonunion quarries." BLS Bulletin No. 468, p. 39.

Plasterers' Local No. 508, Greensburg, Pennsylvania, May 1, 1927:

> "Sec. 2. No member of the Operative Plasterers and Cement Finishers' International Association shall use or handle any models or casts that do not bear the stamp of a union shop, as both are made by members of our association." BLS Bulletin No. 468, p. 55.

REFUSAL TO EXECUTE STRUCK WORK

International Typographical Union Local No. 6, covering newspapers in New York City, January 1, 1924:

> "28. This union reserves the right to its members to refuse to execute all struck work received from or destined for unfair employers or publications.
> "29. All union machine offices are prohibited from supplying machine composition to nonunion offices." BLS Bulletin No. 393, p. 90.

Press Assistants' Local No. 42, Washington, D. C., April 29, 1924:

> ". . . no work that comes under the jurisdiction of . . . Union No. 42, . . . shall be done in the pressrooms of the Closed Shop Division of the Typothetae of Washington, D. C. (Inc.) for any person or firm that becomes involved in a strike or lockout with said union." BLS Bulletin No. 393, p. 103.

Electrotypers' Local No. 3, Chicago, Illinois, April 30, 1924:

> "1. The party of the second part reserves to its members the right to refuse to execute all struck work received from or destined for unfair employing electrotypers or stereotypers." BLS Bulletin No. 393, p. 106.

Bakery Salesmen's Local No. 335, Kansas City, Missouri, May 1, 1923:

> "Art. 6. Where there is a strike or lockout it will not be considered a violation of this contract for salesmen to refuse to serve the same." BLS Bulletin No. 393, p. 121.

International Typographical Union, model contract:

"Sec. 48. The union reserves to its members the right to refuse to execute all work received from or destined for struck offices, unfair employers, or publications." BLS Bulletin No. 419, p. 107.

International Typographical Union Local No. 3, covering newspapers in Cincinnati, Ohio, May 1, 1925:

"Sec. 42. The union reserves the right for its members to refuse to execute all struck work received from or destined for unfair employers or publications." BLS Bulletin No. 419, p. 110.

International Photo-Engravers' Local No. 34, Kansas City, Missouri, March 1, 1925:

Sec. 8. It is understood and agreed that no work is to be done by members of said union when such work emanates from employing photo-engravers participating in or concerned in a strike or lockout with or against members of the International Photo-Engravers' Union of North America. And it is further understood that where the enforcement of this clause entails any loss on the employer party to this contract, said loss shall be borne by the firm, provided that said firm shall have been notified of such strike or lockout." BLS Bulletin No. 419, p. 119.

Amalgamated Association of Street and Electric Railway Employees, Division No. 697, Toledo, Ohio, May 31, 1925:

"Sec. 54. It is agreed that no work shall be done by the mechanical department for any other transportation company that may be unable to do their own repair work because of labor trouble such as strikes or lockouts." BLS Bulletin No. 419, p. 131.

International Brotherhood of Bookbinders Local No. 4, Washington, D. C., April, 1926:

". . . no work that comes under the jurisdiction of Journeymen Bookbinders' Union No. 4 shall be done in the bindery sections of the Typothetae of Washington, D. C. (Inc.), Closed Shop Division, for any

person or firm that becomes involved in a strike or lockout with said union: *Provided*, That in each particular case protest is made to the Typothetae of Washington, D. C. (Inc.), Closed Shop Division, by the executive committee of Journeymen Bookbinders' Union No. 4." BLS Bulletin No. 448, p. 119.

International Typographical Union Local No. 16, covering newspapers in Chicago, Illinois, May 22, 1926:

"Par. 11. The union reserves the right to refuse to execute all work received from or destined for struck offices or 'unfair' employers or publications; provided, that nothing herein contained shall authorize members of the union to refuse to handle type or plate matter to be used in the news or advertising columns of the newspapers of the publishers who are parties to this contract." BLS Bulletin No. 448, p. 121-122.

International Typographical Union Local No. 58, covering job and commercial houses in Portland, Oregon, October 4, 1926:

"The said Typographical Union No. 58, party of the second part, hereby reserves to its members the right to refuse to execute all struck work received from or destined for unfair employers or publications." BLS Bulletin No. 448, p. 128.

International Photo-Engravers' Union, various locals covering Washington, Oregon and British Columbia, January 1, 1926:

"Second C. It is further understood and agreed that no work is to be performed by members of said union when such required work emanates from employing photo-engravers participating in or concerned in a strike or lockout with or against members of the International Photo-Engravers Union of North America.
"Second E. The union reserves the right to its members to refuse to execute all struck work in any shop or any department under the jurisdiction of the Allied Printing Trades Council which is considered unfair by same council; subject, however, to adoption by each

local joint industrial council." BLS Bulletin No. 448, pp. 134-135.

International Printing Pressmen and Assistants' Local No. 63, Sioux City, Iowa, September 1, 1926:

"Sec. 6. It is further agreed by the Sioux City Pressmen's Union No. 63 that there shall be no limit put upon the output of the presses of the employing printers of Sioux City, except that in case of struck work the members of Sioux City Pressmen's Union No. 63 have the right to refuse to perform same." BLS Bulletin No. 448, p. 138.

International Stereotypers and Electrotypers' Union Local No. 65, Seattle, Washington, February 1, 1926:

"Sec. 4. Seattle Stereotypers and Electrotypers' Union, No. 65, reserve to its members the right to refuse to execute work destined for a struck newspaper stereotype room in the State of Washington; provided the party of the second part must give the party of the first part 48 hours' notice that a strike is in progress in said struck newspaper stereotyping room before the said right may be exercised. Incoming work for use by the Star Publishing Co. shall be executed without question." BLS Bulletin No. 448, p. 143.

Amalgamated Lithographers of America, Local No. 6, Cleveland, Ohio, April 1, 1927:

"7. It is further stipulated and agreed that the party of the first part shall not during the life of this contract enter into any association or combination hostile to the Amalgamated Lithographers of America, nor shall it any time render assistance to such hostile combination or association by suspension of lithographic work or by any other act calculated to defeat, impede, or interfere with the policies or activities of the said parties of the second part with relation to its members or any person, firm, or corporation in the lithographic or kindred business.

"8. Said party of the first part jointly and severally observing and fulfilling the terms and conditions hereof on their part to be performed, said party of the second part agrees not to do any act hostile or detri-

mental to the business of the parties of the first part.

"9. The parties of the second part reserve to themselves and their members the right to refuse to execute work received or destined by any employer or employers with whom it may have any controversy or dispute." BLS Bulletin No. 468, p. 139.

International Photo-Engravers Local No. 57, Springfield, Massachusetts, January 1, 1927:

"Art. XII. That the employing photo-engravers party to this agreement will, in employing help, give preference to members of the International Photo-Engravers' Union of North America in any and all processes of photo-engraving and kindred processes and parts thereof; and it is further understood that no work shall be done by members of said union when such work emanates from employing photo-engravers engaged or involved in a strike or lockout against members of the International Photo-Engravers' Union." BLS Bulletin No. 468, p. 143.

FURNISHING GOODS TO A STRUCK SHOP

Union Cloth Hat and Cap Makers, Joint Council of New York, July 1, 1924:

"(c) Workers shall not be required to work for any firm, member of the association, which will work for or supply work to any manufacturer or jobber during the pendency of strikes called or conducted by the union against the latter firm.

"(d) The union reserves the right not to permit its workers to perform work for any member of the association who does any work for firms or who sells goods to firms against whom the union has declared a strike, or who sends goods to such firms, its principals, agents, factors, or jobbers during the pendency of such a strike, and the calling of a strike by the union against a member of the association to enforce the right hereby reserved shall not be construed as a violation of this collective agreement."
BLS Bulletin No. 393, p. 50.

International Ladies' Garment Workers' Union, Joint Board of the Cloak, Skirt, Dress, and Reefer Makers' unions, New York, New York, July 16, 1924:

"Seventh. (a) No member of the association shall order or purchase garments from any manufacturer whose workers are on strike, nor shall any member of the association make or cause to be made any work for any person against whom the union has declared a strike until such strike in each case has been fully settled."
BLS Bulletin No. 393, p. 55.

Amalgamated Clothing Workers of America, Joint Board of Philadelphia, Pennsylvania.

"8. The firm agrees that no work shall be made in any of its shops for any firm or manufacturer against whom a strike may be on."
BLS Bulletin No. 393, p. 58.

International Brotherhood of Bookbinders Local 31 and Bindery Women's Local No. 125, San Francisco, California, March 8, 1923:

". . . no work that comes under the jurisdiction of the union shall be done in the bindery departments of the employers for any person or firm that becomes involved in a strike or lockout with the union or in whose bindery departments members of the union are not allowed to work; provided that, in each particular case, protest is made to the employers."
BLS Bulletin No. 393, p. 85.

Paper Cutters' Union Local No. 119, New York, New York, September 1, 1924:

"56. The union reserves the right to its members to refuse to execute any or all struck work received from or destined to unfair employers or publications."
BLS Bulletin No. 393, p. 86.

International Association of Machinists, Local No. 514, Duquoin, Illinois, 1925:

"It shall be considered a violation of this contract to accept work coming from a struck shop or other shops unfair to organized labor."
BLS Bulletin No. 419, p. 93.

Bakery and Confectionery Workers' Local No. 4, St. Louis, Missouri, May 1, 1926:

"Art. 17. That I will not compel my bakers or helpers to manufacture any goods for any concern where the employees are on a strike or locked out."
BLS Bulletin No. 448, p. 12.

Cloth Hat, Cap, and Millinery Workers' Local No. 6, Philadelphia, Pennsylvania, 1926:

"18. Workers shall not be required to work for the employer if he will work or supply work to any manufacturer or jobber during the pendency of strikes called or conducted by the union against the latter firm.
"19. The union reserves the right not to permit its members to perform work for the employer if the employer should do any work for firms who sell goods to firms against whom the union has declared a strike or who sends goods to such firms, its members, agents, factors, or jobbers during the pendency of such a strike, and the calling of a strike by the union against the employer to enforce the right hereby reserved shall not be construed as a violation of this agreement."
BLS Bulletin No. 448, p. 70.

Cloth Hat, Cap, and Millinery Workers' Local No. 25, Lowell, Massachusetts, August 21, 1926:

"11. It is agreed by both parties that the practice of giving out work to outside shops encourages the establishment and development of the so-called corporation and social shops which are undermining the industry by cutthroat competition by lowering of working conditions and standards and by cheapening the quality of the work, the cumulative effect of which is to reduce the trade to the position of a sweatshop industry. The employer accordingly pledges himself to counteract the foregoing tendencies existing in the trade and agrees to maintain the highest possible standards of working conditions and quality of production. The union, on the other hand, pledges itself to cooperate in the establishment of uniform working conditions and standards throughout the trade by using all legitimate efforts to introduce the same working conditions as prevail in all

the other shops of the cloth hat and cap trade in the Boston market."
BLS Bulletin No. 448, p. 72.

"20. The union reserves the right not to permit its members to perform work for the employer if he sells or buys goods to or from firms against whom the union has declared a strike, or who sends goods to such firms, its agent, factors, or jobbers during the pendency of such a strike, and the calling of a strike by the union against the party of the first part to enforce the right hereby reserved shall not be construed as a violation of this collective agreement."
BLS Bulletin No. 448, p. 72.

International Fur Workers' Local No. 45, Chicago, Illinois, August 16, 1926:

"The firm further agrees that it will not do any work for any firm whose workers are on strike."
BLS Bulletin No. 448, p. 73.

International Ladies' Garment Workers' Union, Joint Board of Cloak, Skirt, and Dress Makers' Union, Locals Nos. 12, 39, 46, 56, 73, and 80, Boston, Massachusetts, February 18, 1926:

"29. The employer agrees not to do any work for or to sell any goods or merchandise to, nor have any work done by, or purchase from firms or their principals, agents, factors, or jobbers during the pendency of a strike declared by the union against such firm."
BLS Bulletin No. 448, p. 77.

Joint agreement of the Waterproof Garment Workers Local No. 20, Cutters Local No. 10, Pressers Local No. 35, and Buttonhole Makers Local No. 64, New York, New York, 1926:

"(f) The employer agrees not to do any work for persons or firms, nor shall he buy from or sell to persons or firms against whom the union has declared a strike, nor shall he send any goods to any contractors or agents of such persons or firms during the pendency of such strike."
BLS Bulletin No. 448, p. 81.

International Pocketbook Workers Union, July 21, 1926:

"In the event that the union will call a strike in any shop having business relations with a member of the association the union shall so notify the association, and the members of the association shall thereupon discontinue business relations with such shops."

"19. No member of the association is to do any work for any other leather goods firm whose factory has been declared on strike by the union. All contracts on hand shall be taken into consideration by the joint grievance board."

BLS Bulletin No. 448, p. 96.

Bindery Women's Local No. 100, Columbus, Ohio, March 23, 1926:

"In case of a strike in a union ship, members of this union shall not perform any work received from or destined for such shop during the continuance of such strike."

BLS Bulletin No. 448, p. 120.

Bakery and Confectionery Workers Union, Jewish Local No. 500, New York, New York, May 1, 1927:

"Seventeenth: In case of a strike in any one of the shops of the employer by the workmen belonging to a union which is recognized by one of the central organizations with which this union is affiliated, the union should be relieved from the obligation of this agreement in all shops belonging to his firm.

"Eighteenth: The party of the second part further agrees not to sell, buy, or deliver bread, rolls, or cakes or pretzels directly or indirectly to any persons or companies against whom a strike was duly declared by the party of the first part."

BLS Bulletin No. 468, p. 12.

Cloth Hat, Cap, and Millinery Workers' Local No. 8, Baltimore, Maryland, January 6, 1927:

"6. Workers shall not be required to work for the employer if he will work or supply work to any manufacturer or jobber during the pendency of strikes called or conducted by the union against the latter firm.

"7. The union reserves the right not to permit its mem-

bers to perform work for the employer if the employer should do any work for firms who sell goods to firms against whom the union has declared a strike or who send goods to such firms, its members, agents, factors, or jobbers, during the pendency of such a strike, and the calling of a strike by the union against the employer to enforce the right hereby reserved shall not be construed as a violation of this agreement."
BLS Bulletin, No. 468, p. 71.

International Fur Workers' Locals Nos. 1, 5, 10, and 15, New York City, February 1, 1927:

"25. The firm is not to do any work or send any work to any concern against whom the union shall be conducting a strike during the pendency of the strike."
BLS Bulletin No. 468, p. 73.

United Leather Workers' International Union, Suit-Case, Bag, and Portfolio Makers' Local, New York, New York, 1927:

"16. It is hereby agreed that no work shall be done in the factory of the employer for any leather-goods firm whose factory has been declared on strike by the union, or vice versa."
BLS Bulletin No. 468, p. 96.

International Brotherhood of Blacksmiths, Drop Forgers, and Helpers District Council No. 1, Chicago, Illinois, May 1, 1927:

"Art. 11. In case either strike or lockout in other shops by our members and work done by them shall be received by the above company our members reserve the right according to the constitution to refuse to do such work without violating the terms of this agreement. Union men shall not be required to work with non-union men."
BLS Bulletin No. 468, p. 103-104.

International Brotherhood of Teamsters Local No. 742, Chicago, Illinois, May 1, 1927:

"Art. XVII. It will not be considered a violation of this agreement on the part of any driver who refuses

to deliver goods to parties involved in any lockout or legal strike of any union."
BLS Bulletin No. 468, p. 202.

"HOT GOODS" CLAUSES IN TEAMSTER CONTRACTS 1923—1927

International Brotherhood of Teamsters Local No. 335, Kansas City, Missouri, May 1, 1923:

"Art. 6. Where there is a strike or lockout it will not be considered a violation of this contract for salesmen to refuse to serve the same."
BLS Bulletin No. 393, p. 121.

International Brotherhood of Teamsters Local No. 405, St. Louis, Missouri, January 1, 1925:

"Art. 24. Members of Local No. 405 will not be allowed to haul passengers known to be strike breakers to or from a place that is on strike or that is under police protection."
BLS Bulletin No. 419, p. 149.

International Brotherhood of Teamsters Local No. 553, New York, New York, January 1, 1926:

". . . If any concern is unfair, it shall not be a violation of this agreement for men to refuse to work for them."
BLS Bulletin No. 448, p. 196.

International Brotherhood of Teamsters Local No. 742, Chicago, Illinois, May 1, 1927:

"Art. XVII. It will not be considered a violation of this agreement on the part of any driver who refuses to deliver goods to parties involved in any lockout or legal strike of any union."
BLS Bulletin No. 468, p. 202.

APPENDIX B

SOURCE:

Collective Bargaining Provisions, Strikes and Lock-Outs; Contract Enforcement, U. S. Department of Labor, Bureau of Labor Statistics, Bulletin No. 908-13, November 1949.

"137. Union May Terminate Contract, After Notice, If Employer Requests Union Members to Work on Goods from Plant Not Under Agreement with the Signatory Union

"In the event the company requests its employees to handle any work normally produced in a [type of product or process] plant, which comes from any trade shop which is not under contract with the [International Union], then the union shall be entitled to terminate its contract with the company by giving proper notice.

"Nothing in this agreement is to be construed as an agreement by an employee that such employee will work on any graining machine, camera, art (production after camera) or platemaking (other than that actually in process in plant) when such products or the result of such work are received from or destined to a plant, against which the [International union] is engaged in a strike." p. 39

"139. Union May Refuse, After Notice, To Work on Material to or from Struck Plant

"In the event of a strike authorized by the international union in the tannery of a leather manufacturer, the employer shall not cause the employees to perform labor on hides or skins coming from or going to such tannery where a strike exists, when notice of the strike shall have been given to the secretary of the ..... Leather Manufacturers' Association in writing, registered mail, postage prepaid.

"140. Union May Refuse, After Notice, To Work on Material from Struck Plant

"The employer shall not cause the employees to work on

skins or wool in process which may be sent to the pullery from another pullery where a duly authorized strike exists, provided notice of such strike is given to the employer by the union, registered mail, postage prepaid.

"141. Refusal to Work on Material for a Struck Plant Not a Violation of Agreement

"Failure or refusal by any employee or all the employees of an employer to perform work destined, directly or indirectly, for a concern on strike, shall not be deemed or interpreted as a breach of the agreement, and neither such employees nor the union shall be held liable in damages by reason thereof. It is agreed that the performance of such work shall not be deemed in the regular course of employment of the workers.

"142. Employer Not To Deal With Firms Where Strike Is In Effect

"No member of the association shall do or cause to be done any work for or deal with any person or concerns against whom the union has declared a strike until such strike has been fully settled.

"143. Goods on Hand or in Transit Exempt from 'Unfair' Work Ban

"No employee shall be required to handle any product which is manufactured or processed in an establishment where a strike is in progress, or listed as unfair to organized labor. All merchandise on hand or in transit is to be exempt.

"144. No Work on Goods Declared Unfair by International Union or CIO Affiliate

"At no time shall employees be required to act as strike-breakers, go through picket lines or armed guards, or handle products declared unfair by the [union] or an affiliate of the Congress of Industrial Organizations.

"145. Union Members May Refuse to Handle Strike Bound Goods or Cross Picket Line of Affiliate of Parent Union or American Federation of Labor

"Nothing in this agreement shall be construed to in anywise limit the unqualified right of the union to refuse to handle strike-bound goods in the event the employer has labor difficulties with any other affiliated union of the international union or any affiliate of the American Federation of Labor, or to require any member of the union to cross the picket line of any other union affiliate of the international union or the American Federation of Labor.

"146. No Processing of New Material or Work Not Connected With Company's Product from Plant Struck by Parent Union

"The company agrees that it will not process any new material or work for profit not connected with its product if such new work comes from a company whose employees are engaged in a strike sanctioned by the international union," pp. 40-41.

"153. Union Allowed to Inspect Employer's Books To Enforce Ban on Struck Work

"It is hereby agreed that no work shall be done in the factory of the employer for any other firm whose factory has been declared on strike by the union. It is also agreed that a representative of the union shall have the right to inspect at any time the books of the employer for the purpose of ascertaining for whom the employer is working or selling his merchandise to, or is buying ready-made goods from." p. 43.

APPENDIX C

SOURCE:

Collective Bargaining Contracts, Bureau of National Affairs, Inc., 1941

PROHIBITION AGAINST USE OF NON-UNION CONTRACTORS

Comment:

For the protection of the union against low-cost non-union competition, many agreements include a prohibition against dealing with any contractor who does not have contractual relations with the union or does not comply with union standards of production. Any employer who gives out his work to such a contractor is deemed to have broken the agreement.

Clauses:

"Penalties for Dealing with Non-Union Contractors—The following agreement required the payment of damages for contracting to non-union contractors. In addition, no work shall be given to any contractor against whom the union has a strike:

> "Whenever it shall appear that the employer gives work to a contractor or manufacturer that is not in contractual relations with the union, upon the request of the union the employer shall forthwith withdraw his work from such firm whether such work be in process of operation or otherwise until the firm enters into contractual relations with the union. In any such case, the employer shall pay the union damages in such amount as the Impartial Chairman (as established under Section —— of this contract) shall determine based on the lost earnings caused members of the union by such violation.
>
> "If and when the union through its representative notifies the employer that his or its contractors are not operating a shop in accordance with the standards herein established, the employer agrees not to give

any further work to such contractor until he has been reinstated by the union in good standing, but it is agreed, however, that garments actually in process shall be completed; all other work to be withdrawn and no further work given. If the employer violates this agreement at any time after twenty-four (24) hours subsequent to being notified by the union, as provided herein, he shall pay the union damages in such amount as the Impartial Chairman shall determine based on the lost earnings caused members of the union by such violation.

"The employer shall not directly or indirectly give work to a contractor or sub-manufacturer, nor purchase any ready-made garments from a manufacturer, nor accept any work from a jobber, against whom the union is conducting a strike. The word, 'Jobber' in this clause shall mean only those who are engaged in the manufacture of garments through the medium of inside or outside shops. (Boston Coat and Suit Manufacturers Assn. *and* International Ladies' Garment Workers' Union—AFL)" pp. 174, 175.

Clause:

"Handling Non-Union Work—This clause, in veiled terms, calls for reference of the question of handling non-union products to a special committee:

"If at any time a product is brought into the Reading plant and the employees and the Union feel it should not be handled, it is agreed that a special grievance committee meeting will be arranged for to discuss the matter in detail. (Armour & Co., *and* Amalgamated Meat Cutters and Butcher Workmen—AFL). p. 256.

NON-UNION GOODS

Comment:

Efforts of unions to extend union conditions throughout an industry frequently result in contractual obligations binding employers not to do business with firms where union conditions do not prevail or where strikes are in progress. Such agreements are found with especial fre-

quency where it is common or feasible to contract work out. See *Contracting Work Out.*

Contracts having the same general purpose may require that the union forbid its members to work for firms not covered by the agreement or provide that the members need not work on 'hot goods', that is, goods from, or destined for, non-union firms or those against whom employees are on strike.

Clauses:

"No Purchases from Non-Signatory Firms—Under this clause, members of an employer association agree not to purchase specified accessories from firms not covered by the contract:

> "Members of the Association who purchase or cause to be manufactured belts, covered buttons, neckwear, artificial flowers, embroideries, buckles, hemstitching, pleating and tucking on garments, shall deal only with such firms as are in contractual relations with the Union. (United Better Dress Manufacturers Assn. *and* International Ladies' Garment Workers' Union—AFL).

"No Selling to Non-Signatory Firms—The employer agrees, under this clause, not to perform work for or sell to any firm not covered by the contract:

> "If the Employer is doing part of his work or all of his work for jobbers or manufacturers or both, in this case the Employer agrees not to make any work for or sell garments to any jobber or manufacturer that does not have any contract with the Union. (Boston Coat and Suit Manufacturers Assn. *and* International Ladies' Garment Workers' Union—AFL).

"Mandatory or Preferential Use of Union-Made Goods—This clause illustrates both partial and complete banning of non-union goods:

> "Only union made malt shall be used. All other union made materials and machinery shall be given prefer-

ence. (Brewery and Beverage Firms, Ice Plants, and Agencies *and* International Union of United Brewery, Flour, Cereal, and Soft Drink Workers—AFL).

"Union May Lift Restriction—Under this clause, the 'hot goods' restriction may be lifted by the union:

> "No printer shall print any pattern delivered from any wall paper mill in the United States which is not in contractual relationship with the Union, nor shall any color mixer mix color therefor, except by the permission of the General Executive Board of the Union. This prohibition contained herein shall extend to any wall paper mill the employees of which are on strike. (Wallpaper Institute *and* United Wallpaper Craftsmen and Workers—AFL).

"Conformity with Union Conditions—Conformity with conditions established by the union may be sufficient to let down the bar against otherwise prohibited goods:

> "The employer agrees not to buy any composition parts of dolls from or to sell any composition parts of dolls to any concern that does not conform to the wages and hours set forth in this agreement and each individual employer agrees that he will not buy from or sell to any concern working under non-union conditions any composition parts of dolls. (Associated Doll Manufacturers of New York, Inc., *and* Playthings and Novelty Workers—CIO).

"Union Need Not Handle 'Hot Goods'—The union reserves, under this clause, the right to refuse to execute all work destined to or from unfair employers:

> "The Union reserves the right to its members to refuse to execute all work destined to or from unfair employers. It is understood and agreed that the term 'unfair employers' as used in this section means unfair employers engaged in the printing or publishing industry operating departments over which the San Francisco Printing Pressmen and Assistants Union No. 24 or affiliated local unions have jurisdiction. It is understood and agreed that this clause shall not apply to the Employers so far as employees in their

plants are concerned who are working under a bona fide agreement with any lawful collective bargaining unit. (Employing Printers' Assn. *and* San Francisco Printing Pressmen—AFL).

"No Union Labor To Be Furnished Non-Signatory Firms—This clause binds the union to withhold workers from firms not parties to the contract:

> "The parties of the first and second parts agree that neither the Union nor Local No. 3 will furnish workers to shops which are not in contractual relationship with Local No. 3. (Fur Dressers Guild and Independent Firms *and* Fur and Leather Workers Union—CIO). pp. 394, 395.

"Refusal to Handle 'Unfair' Goods—The union refuses, by this clause, to handle any 'hot goods' coming from 'unfair' employers:

> "Party of the second part reserves the right to its members to refuse to execute all work received from or destined for unfair employers. It is understood and agreed that the term 'unfair employers' as used in this section means unfair employers engaged in the printing or publishing industry, operating departments over which San Francisco Typographical Union No. 21 has jurisdiction. (Employing Printers' Assn. of San Francisco *and* San Francisco Typographical Union—Ind.).

"Sympathetic Strikes Against Competing Firms—This sympathetic strike provision covers only firms competing with the employer:

> "In case the United Office and Professional Workers of America are conducting a strike in a plant competing with this Employer, the employees of this Employer shall not be required to handle or work on products obtained from or designed for such competing employer. (R. L. Polk and Co. *and* United Office and Professional Workers—CIO)". p. 523.

APPENDIX D

SOURCE:

LABOR CONTRACT CLAUSES in the Automotive and Aviation Parts Manufacturing Industry, compiled and edited by Malcolm W. Welty, published by Automotive & Aviation Parts Manufacturers, Inc., 900 Michigan Building, Detroit 26, Michigan, 1945.

"602 (UE). No employee shall be required to do any work for any of the Company's competitors whose employees may be involved in a labor dispute. 'New Work' is defined as any order for work coming into the shop after the outbreak of a strike. However, the Union agrees that all work on hand of such of the Company's competitors that may be involved in a labor dispute shall be completed and the Union shall not interfere with the completion of such orders.

"603 (U). The Company agrees that should a controversy arise in regard to materials being brought into the plant from a strike-bound plant, settlement of such controversy shall be subject to negotiations between the Company and the Executive Shop Committee and there shall be no stoppage of work while negotiations for settlement are pending.

"604 (U). Machinery, tools and material used in strike-bound plants shall not be brought into this plant. Such items shall be received only with the sanction of the Union Bargaining Committee. Employees may refuse to deliver machinery, tools and material to any customer of the Company whose employees are on strike because of labor dispute.

"605 (U). Except for the duration of the War, employees may refuse to handle material which the Company purchases from any supplier while its employees are on a strike authorized by their Union. Drivers may refuse to deliver

goods to any customer of the Company whose employees are on strike because of labor dispute.

"606 (IA). It shall not be considered a violation of this agreement for employees to refuse to violate a picket line established by American Federation of Labor affiliates, or to refuse to work on work from plants where strike or lockout conditions prevail.

"607. (U). The Union may refuse to do work which the Company takes over from any employer in whose establishment a strike exists, which work would ordinarily be done at the establishment where the strike is in progress; it may also refuse to accept any material from an employer whose employees are on strike, provided the Company is given notice that such a strike has been approved by the International Office.

"The provisions of the above paragraph do not apply to work which may be essential to the National Defense.

"608 (U). The Management agrees that should a controversy arise in regard to materials, tools, etc., being brought into the plant from a strike bound plant, settlement of such controversy shall be subject to negotiations between the Management and Executive Shop Committee, and there shall be not stoppage of work while negotiations for settlement are in progress.

"609 (U). Employees may refuse to handle material which the Company purchases from any supplier whose employees are on strike because of a labor dispute. Drivers may refuse to deliver goods to any customer of the Company whose employees are on strike because of any labor disputes.

"610. (U). Should a controversy arise in regard to materials, tools, etc., being brought into the plant from a strike-bound plant, settlement of such controversy shall be subject to negotiations between the Company and the Shop

Committee, and there shall be no stoppage of work while negotiations for settlement are in progress."

(Chapter VI, GRIEVANCES AND GRIEVANCE PROCEDURE, C. Strikes and Lockouts, 2. Sympathetic Strikes or Other Sympathetic Action, p. 142-143.)

NOTE: The symbols UE, U, and IA refer to the United Electrical, Radio, and Machine Workers, the United Auto Workers, and the International Association of Machinists, respectively.

APPENDIX E

Illustrative Provisions in International Union Constitutions on Refusal to Handle Unfair or NonUnion Goods or Materials.

1. "Local unions in making contracts or wage agreements shall insert a clause reserving the right to refuse to execute all struck work received from or destined for unfair employers or publications."

   Source: Constitution By-Laws, General Laws and Convention Laws, as amended 1955, of International Brotherhood of Bookbinders.
   Section 73 Page 61

2. "Subordinate unions at all time have the right to define as struck work composition and mailing room work executed wholly or in part by non-members, and composition, mailing room, or other work coming from or destined for printing concerns which have been declared by the union to be unfair, after which union members may refuse to handle the work classified as struck work."

   Source: Book of Laws of the International Typographical Union, effective January 1, 1956.
   Art. III, Section 5 Page 112

3. "When an employer, involved in a properly sanctioned strike as hereinabove defined, shall cause the work which is normally performed by the striking members to be performed in other places of employment, whether owned or controlled by such employer or not, the International President shall order any members who shall be working in such other places of employment to cease performing such work, or to cease working in such other places. Such an order by the International President shall first be approved by the Executive Board, to entitle members complying therewith to strike or victimization donations. The International President shall

take such action as he shall deem appropriate against any members who shall refuse or fail to comply with this order to cease work, subject however, to a member's right to appeal, as provided for in Article 13, Section 4."

Source: International Die Sinkers' Conference Constitution, effective November 5, 1948.
Art. 9, Section 3 Page 22

4. "No further contracts shall be approved by the General Executive Board unless a clause stipulating that all circled heading and jointed staves purchased from outside sources bear the stamp of the Coopers' International Union.

Source: Coopers' International Union of North America, effective April 18, 1955.
Section 60 Page 19

5. "No member of this I. U. shall work for any person, firm or corporation which employs any non-union employee in any branch of the trades within the jurisdiction of this I. U., or work for any sub-contractor who takes a contract from any person or firm who employs any non-union employe in any branch of the trade composing this International Union, or work for any firm or person either directly or indirectly who has been placed on the unfair list by this International Union."

Source: Constitution and Rules of Order of the Bricklayers, Masons, Plasterers' International Union of America, effective October, 1954.
Art. XVIII Section 16 (2) Page 78

6. "When one craft has trouble and is forced to cease work to obtain a settlement and the firm operates their jobs with foreman or any other workman, all other crafts shall come to the aid of their brothers and sisters and cease work until the trouble is satisfactorily settled.

Source: Constitution, International and Subordinate Local Unions of the International Brotherhood of Operative Potters, AFL.
Section 123 Page 17

7. "Any firm or corporation manufacturing cement or plastering material whose solicitors or agents advise any owner, builder or architect to employ non-union labor, shall be classed as unfair to the O.P. &C.M.I.A., and it is within the right of the members of the O.P. & C.M.I.A. to refuse to work on any job where the unfair material is used within the jurisdiction of the International Association.

Source: Constitution of the Operative Plasterers' and Cement Masons' International Association of the U. S. and Canada, effective May 16, 1955.
Section 153 Page 70

8. "In case of a strike or lockout when the employer proposes getting his work made in a shop other than that in which the strike or lockout exists, the Executive Board may, if they deem it advisable, order the men to refuse to make the work. And when such order is issued it shall be the duty of the members to refuse to make the work. Members refusing to be governed by the order of the Executive Board will be liable to suspension or expulsion.

Source: Constitution of the International Molders and Foundry Workers Union, effective October 1, 1955.
Art. XV Section 169 Page 63

9. "Members of the Union shall refrain from working on ships diverted from a Port where a labor dispute exists between the I.L.A. and any of its subdivisions in connection with such ship, providing such dispute has been approved as provided herein.

Source: Constitution and Rules of Order of Interna-

tional Longshoremen, Ind. effective July 11, 1955.
Art. XXVI Section 23 Page 48

10. "Members of the Union shall refrain from working on ships diverted from a port where a labor dispute exists between the International Brotherhood of Longshoremen and any of its subdivisions in connection with such ship, providing such dispute has been approved as provided herein.

Source: Constitution and Rules and Order of The International Brotherhood of Longshoremen, A.F.L. effective July 26, 1954.
Art. XXVI Section 18 Page 45

11. "When an employer, involved in a properly sanctioned strike as hereinabove defined, shall cause the work which is normally performed by the striking members to be performed in other places of employment, whether owned or controlled by such employer or not, the International President shall order any members who shall be working in such other places of employment to cease performing such work, or to cease working in such other places. Such an order by the International President shall first be approved by the Executive Board, to entitle members complying therewith to strike or victimization donations. The International President shall take such action as he shall deem appropriate against any members who shall refuse or fail to comply with this order to cease work, subject however, to a member's right to appeal, as provided for in Article 13, Section 4.

Source: International Die Sinkers' Conference Constitution, effective November 5, 1948 and April 6, 1955.
Art. 9 Section 3 Page 22

12. "All contracts or agreements entered into by any subordinate union shall have a provision therein reserving

to the members of such subordinate unions the right to refuse to execute any struck work received from or destined to any unfair employing printer or publisher.

Source: Constitution and Laws of the International Printing Pressmen and Assistants' Union of North America, effective August 1952.
Art. XV Section 8 Page 48

13. "Local unions, in making contracts or wage agreements, shall insert a clause therein reserving to their members the right to refuse to execute all struck work received from or destined for unfair employing stereotypers, electrotype finishers, electrotypers, wax engravers, wax rulers, aluminumtypers and rubber and plastic printing plate manufacturers.

Source: International Stereotypers' and Electrotypers Union of North America, effective February 1956.
Art. XIII Section 7 Page 52

Reply

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Resp

Brief

JR

NDENT

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 273

NATIONAL LABOR RELATIONS BOARD,
PETITIONER

v.

GENERAL DRIVERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS UNION, LOCAL NO. 886, AFL-CIO,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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93 Cong. Rec. 6445-6446, 2 Legis. History 1544 16

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IN THE

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OCTOBER TERM, 1957

No. 273

NATIONAL LABOR RELATIONS BOARD,
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v.

GENERAL DRIVERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS UNION, LOCAL NO. 886, AFL-CIO,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR RESPONDENT

THE FACTS

The facts of this case insofar as are relevant to this Respondent's presentation are contained in the Trial Examiner's Report (R. 26) as adopted by the Board (R. 62). They are briefly as follows:

At the time of the controversy which gave rise to the instant matter, Respondent was a labor organization known as General Drivers, Chauffeurs, Warehousemen and Helpers Union, Local No. 886, AFL-CIO (hereinafter referred to as the "Drivers' Union" or the "Union") whose members were employed by various motor vehicle carriers in the Oklahoma City area. Such members were employed both on the docks or loading platforms of the carrier and on the

carrier's trucks. The collective bargaining agreement between the Union and such carriers setting forth the working conditions of the carrier's employees, so far as the record indicates and for the purposes of this case, was entered into freely by both parties and for mutual considerations. That agreement contained a clause, common in the industry, under which it was agreed by the carriers that "members of the Union shall not be allowed to handle or haul freight to or from an unfair company . . ." (This type of clause is generally referred to as a "hot cargo," or "unfair goods," or "struck goods" clause, and will be referred to throughout this brief as a "struck goods" clause.) The term "unfair company" as used in the clause included companies engaged in a labor dispute and whose employees were on strike.

The American Iron and Machine Works Company, engaging in the manufacture of oil field equipment and doing business in the Oklahoma City area, became involved in a labor dispute with Lodge 850 of the International Association of Machinists, AFL-CIO (the petitioner in case number 324), and its employees who were members of that union went on strike. In the course of the strike, the struck employer attempted to make delivery of its products to the docks of various of the carriers whose employees were represented by the Drivers Union as indicated above. The delivery trucks were driven by American Iron nonstriking employees, and when they arrived at the docks were picketed by the Machinists Union.

Acting pursuant to the foregoing clause in the collective agreement between the carriers and the Drivers Union, that Union, on occasions when American Iron trucks appeared at the carriers' loading platforms to unload American Iron products for shipment, induced, instructed or encouraged, but did not coerce, its members employed by the carriers on the platforms (that is, those employees stationed on the docks engaged in loading and unloading

freight as distinguished from the drivers employed by the carriers to drive their vehicles) to comply with the "struck goods" clause by refraining from unloading the trucks. In addition, it was found by the Trial Examiner that the Machinists' pickets requested the loading platform employees who were members of the Drivers Union not to unload the American Iron trucks.[1] Such members employed by the foregoing carriers did refrain from handling American Iron freight.

All but one of the carriers, acting in disregard of their commitments and of the scope of employment of their employees as contained in the "struck goods" clause, requested but did not order the loading platform employees to unload the American Iron trucks. The members of the Drivers Union, choosing to assert their contractual rights, disregarded such requests upon the suggestion of their union representatives. At least one carrier (Leeway) did not seek to have its employees disregard the "struck goods" clause and made no request that American Iron freight be handled.

THE QUESTION PRESENTED

The question in this case is whether the agreement between the carriers and the Union, under which the carriers agreed that members of the Union shall not be allowed to handle freight from an unfair company, and the Union's action in inducing its members to conform to that agreement by refraining from handling freight from an unfair company, are proscribed by the National Labor Relations Act as amended, particularly by section 8(B)(4)(A) thereof.

ARGUMENT

Although four of the five members of the National Labor Relations Board participating in the decision of the Board

[1] The Machinists (petitioner in No. 324) deny making any such requests or that there was any evidence sufficient to warrant the Board's finding that such requests were made.

in this case either found or assumed that the "struck goods" clause of an agreement was in itself legal and proper, i.e., unions and employers were free under the Act to enter into such agreements, the Board nevertheless concluded that union attempts at enforcement by inducing its members pursuant to the agreement not to handle the freight of the American Iron Company constituted a violation of Section 8(b)(4)(A) of the Act. The Court below, in reversing the Board, determined that such union attempts at enforcement were permissible under the Act and, in addition, declared that the "struck goods" clause as such was legal under the Act. In its brief before this Court the Board has heavily argued the question of the validity of "struck goods" agreements as well as the question of their enforceability, and has attached to its brief a copy of the most recent decision of the Board, decided after writ of certiorari was granted in this case, in which a majority of the Board members for the first time found "struck goods" agreements to be invalid on their face. Since the Board apparently deems the issue of legality to be implicit in this case and a necessary prerequisite to a determination of the question of union enforceability, this respondent has undertaken in this brief to treat the issue of legality of "struck goods" agreements at length.

I

THE POLICY OF THE ACT RESPECTING "STRUCK GOODS" AGREEMENTS

A. The Nature and Function of the "Struck Goods" Agreement.

Since this case involves a question concerning the legality and enforceability under Taft-Hartley of so-called "struck work" or "hot cargo" agreements, it might be well at the outset briefly to outline the purpose and function of such agreements and the reasons why unions and employers see fit to enter into them.

These agreements customarily take the form of commitments by employers that they will not allow or require

their employees to handle, load or unload, or work on goods or products of other employers engaged in a labor dispute with those other employers' employees. The function and purpose of these agreements, their widespread and traditional use not only in the field of transportation but in American industry generally, and their role in stabilizing employment conditions and localizing labor disputes within an industry, are set forth in an Economic Brief filed by petitioner in support of this brief. It is the purpose of that Economic Brief to supply this Court with that information in order to assist in properly evaluating and resolving the issue of whether Congress intended or could have intended either to invalidate such agreements in their entirety or to render them unenforceable by the union parties thereto under Section 8(b)(4)(A) of the Act.

As more fully set forth in the Economic Brief, long prior not only to the Taft-Hartley amendments in 1947 but to the Wagner Act itself, employers, motivated by various reasons, often of self-interest, have sought to assist unions in their disputes with other employers by agreeing not to deal with or handle the goods of other employers engaged in a primary labor dispute.[2]

This was sometimes done by formal agreement and at other times on an *ad hoc* basis either by union request or by unsolicited action of the neutral employer. The National Labor Relations Board, at p. 40 of its brief before the Sec-

[2] Although immaterial to Section 8(b)(4)(A), it may be noted that such an agreement probably would not violate the Sherman Anti-Trust Act. *Allen-Bradley Co.* v *Local No. 3, I.B.E.W.*, 325 U.S. 797, 809 ("Employers and the union here did make bargaining agreements in which the employers agreed not to buy the goods manufactured by companies which did not employ the members of Local No. 3. We may assume that such an agreement, standing alone would not have violated the Sherman Act"); *Schatte v International Alliance*, 182 F. 2d 158, 167 (C. A. 9), cert. denied, 340 U.S. 827.

ond Circuit in the first court case involving the validity of such agreements—*Rabouin v. NLRB* (sometimes referred to as the *"Conway Express Case"*), 195 F. 2d 906—summarized a number of the considerations which may motivate an employer, with or without union request, to extend this type of cooperation to unions:

> "He may desire to aid the union lest substandard employment terms at the struck plant introduce undesirable competitive practices resulting from lower labor costs; the union may grant him a concession on other issues in exchange for his assistance; he may feel that preservation of harmonious relations with the union is preferable to doing business with the struck employer; or he may be convinced of the rightness of the union's cause."

The reasons motivating unions to enter into such agreements are set forth at length in the Economic Brief filed herewith. In brief summary, such agreements represent to union members a formalization of the principle upon which the organized labor movement of this country was founded and on which it has prospered, namely, the principle of mutual aid and assistance, of making common cause with fellow workers, and doing nothing to assist their adversaries. This principle finds place and expression in section 7 of the Act which specifically guarantees employees the rights "to engage in . . . concerted activities for the purpose of . . . mutual aid or protection." Further, and even more important, such agreements, by reason of the impetus they give in organizing the unorganized, afford and have traditionally afforded a very helpful means of accomplishing "the objective of any national labor organization, . . . elimination of price competition based on differences in labor standards." *Apex Hosiery Company v. Leader*, 310 U.S. 469, at 503.

B. "Struck Goods" Litigation Before the Board and in the Courts.

As is indicated in the brief filed by the National Labor Relations Board herein and, in particular, by the concurring and dissenting opinions of the various Board members in the Board's latest decision dealing with the "struck goods" issue—*Truck Drivers Local 728 and Genuine Parts Company*, 119 NLRB No. 53 (attached to the Board's brief as Exhibit "B"), the status of the "struck goods" agreements under the National Labor Relations Act has had a tortuous history. Beginning with the Board's decision in the *Conway Express* case (*Teamsters Local 294 and Rabouin*, 87 NLRB 972), the Board for a number of years considered the "struck goods" agreement both valid and enforceable under the Act. However, commencing with the appointments to the Board which took place beginning in 1952, an about-face process began to take place. The first step was taken in the *McAllister* case, 110 NLRB 1769, where a majority of the Board found such agreements to be valid, but enforceable by the union only if the employer party to the agreement desired to abide by its commitment. The next step was taken in the *Sand Door* case (*Local 1976, United Brotherhood of Carpenters*, 113 NLRB 1210, enforced, *sub nom. National Labor Relations Board v. Local 1976, United Brotherhood of Carpenters, 241 F. 2d 147*, cert. granted October 14, 1957, No. 127, this Term), and in the present case, where a majority of the Board held that such agreements, though not proscribed by the Act, could not be enforced by the union by appeals to its members to observe the terms of the "struck goods" clause, and this even though the employer did not seek to repudiate the agreement and was willing to permit his employees to refuse to handle struck goods. The wheel came full circle in the *Genuine Parts* case, *supra*, decided after writ of certiorari was granted in the instant case, where a majority of the Board, though by different processes of rea-

soning, held that all "struck goods" agreements are both invalid on their face and unforceable by their terms.[3]

The path of "struck goods" agreement litigation in the courts, while less tortuous, has similarly been marked with a variety of opinions. Although no court has declared the agreement invalid on its face, at least two circuits (the Second in *Conway* and *Crowley Milk*[4] and the District of Columbia in *American Iron* have expressly affirmed both their validity and enforceability, and only one circuit (the Ninth in *Sand Door*) has agreed with the present Board majority that such agreements are unenforceable by the union parties to them.

C. The Contentions of the Board.

The Board, in its brief herein, advances two principal arguments. Its first contention, and one basic to all of its arguments, is that in enacting Section 8(b) (4) (A) Con-

[3] Since 1952 the decisions dealing with such agreements have all been noted for the variety and contrariety of the opinions rendered by the various Board members who then happened to hold office. Perhaps one can be pardoned for wondering in what regard the principal of administrative expertise can be held when the deciding vote on the concept of total illegality, as announced in *Genuine Parts*, comes from a Board member whose "10 years of experience with the cases involving hot cargo" (Appendix "B" to Board Brief, p. 89) is actually based on four months' experience as an administrator and 9½ years as an advocate for employers, including numerous motor freight carriers, and when at no time since 1952 have more than two Board members been able to see eye to eye on any single aspect of "hot cargo" validity or enforceability. The Second Circuit in the *Crowley Milk* case *(Milk Drivers Union v. N.L.R.B.*, 245 F. 2d 817, pending on certiorari *No.* 412, this Term, stated in this respect as follows:

> "This is not the occasion for reversing ourselves in deference to administrative expertise, for the legal question is one of legislative intent and statutory construction as to which the courts are fully competent and, indeed, have the ultimate responsibility. Moreover, the present issue has divided the agency into three fragmentary views which seem to be still in the process of development."

[4] For the convenience of this Court a copy of the decision in *Crowley Milk* is attached to this brief as Appendix "A".

gress desired to protect not only the innocent third party neutral against forced, i.e., strike-induced, involvement in the labor disputes of others, but in addition, Congress desired to protect the general public and other employers, (including employers engaged in the primary dispute) who use, sell, transport or handle the boycotted goods from the effects of any refusal to handle or work on struck goods. From this premise, the Board then argues both the illegality of any attempt to bargain away the protection of others, as well as for an expanded reading of Section 8(b) (4) under which any union induced refusal to handle freight, even though pursuant to a struck-goods clause, is proscribed, and this regardless of whether the particular employer has acquiesced in such refusal. Thus, the Board, while arguing the illegality of "struck goods" agreements on their face, also argues that regardless of their legality, any union attempt to enforce them by requesting or inducing its members to refrain from handling struck goods constitutes a violation of the terms of Section 8(b) (4) (A), as such terms are construed by the Board.

We repeat, however, that fundamental to all of the Board's conclusion respecting illegality or unenforceability of the "struck goods" clause is its major assumption that Congress intended to protect many others in addition to the reluctant neutral—indeed, that Congress intended to protect not only that neutral but all who might be affected by the refusal of that neutral's employees to handle goods. Recognizing this premise as the keystone to its entire argument, the Board has striven mightily to give it support. It is submitted that the Board has fallen far short of establishing that premise; on the contrary, when it is seen what the Congress has actually done in Section 8 (b) (4) (A) and elsewhere in the Act, what it has directly or indirectly refrained from doing, and what its debates and Reports demonstrate concerning its intention, it will be plain that Congress neither intended nor by its use of language ac-

complished the broad objectives ascribed to Section 8(b)(4)(A) by the present majority of the Board.

D. The Language of the Act Does Not Indicate Any Intent to Protect the Public Generally from Secondary Boycotts and Their Effects But Only to Protect A Neutral Against Strike Action to Force That Neutral to Boycott Someone Else.

Let us start with the language of the Act to see what the Congress actually has done as opposed to what it may be speculated it intended to do. If it was indeed the intent of Congress, aware of the prevalence of "struck goods" agreements in American industry, to protect all persons who might be adversely affected by their use, it could be assumed that the Congress would use precise language to accomplish that object. Thus, the "struck goods" agreement could have been outlawed in so many words, as was the closed shop and all other forms of union security agreements by Section 8(a)(3) of the Act. That Congress did not do so directly—that there is no language proscribing the "struck goods" agreement as such—is of initial significance.[5]

It is also of significance that Congress did not use direct and easily available language to interdict the forcing or requiring of persons other than the third party neutral from ceasing to do business with someone else. For instance, had it actually desired to protect not only against involuntary involvement of neutrals by preventing strike action against them, but also against involvement of other employers or individuals such as customers who might be indirectly affected, although no strike was directed against them, it

[5] Since, as indicated by this Court in *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342 at 346, Congress in enacting legislation in the field of labor relations intended "to absorb and give statutory approval to the philosophy of bargaining as worked out in the labor movement of the United States", and since the making of hot cargo agreement was a traditional and integral part of that bargaining, there is all the more reason to suppose that Congress would have used express language of prohibition had it indeed intended to proscribe that type of agreement.

could easily have done so simply by adding another subsection to Section 8(b) which would spell out in so many words a prohibition against either union or employer boycott activities which caused interruptions in the business of any third parties affected by the boycott. Or, perhaps more succinctly, it could merely have added the following italicized language to subsection (A): "Forcing or requiring *that or any other* employer or other person to cease handling etc." Congress did just that when it did desire to protect other third parties not being directly struck as in subsection (B) where it expressly stated that it shall be an unfair practice to induce the employees of any employer to strike where an object is "forcing" or requiring *any other employer* to recognize or bargain with a labor organization . . . unless such labor organization has been certified . . . "

The Board argues (Board Brief, p. 37) that the term "or other person" in the phrase "forcing or requiring any employer or other person to cease doing business with another," as contained in Section 8(b)(4), indicates an intent to shield others than the third party neutral employer. As we shall see the legislative history of the Act does not support this conclusion, and we suggest that it is more reasonable to assume that the term "other person" was used so as to include third party neutrals who might not be embraced under the Act's definition of "employer." (Sec. 2(2)), such as, for instance, sole proprietors having no employees on their payroll. If the Board's construction of the phrase "other person" as used above is adopted, namely, that it includes any third party affected by a boycott, then every strike would be outlawed because any strike has the effect of forcing some employer or "other person" to cease dealing in the products of, or doing business with some other person. But this court has indicated that Section 8(b)(4) cannot be read or applied literally and without reference to purpose, and that neither that section, nor the Act itself was designed to interfere with the right to strike

or picket a primary employer in a primary dispute. (See *NLRB v. International Rice Milling Company*, 341, U. S. 665; *Di Giorgio Fruit Corporation v. NLRB*, 191 F.2d, 642, certiorari denied 342 U. S. 869). On the contrary, Section 7 of the Act, as well as Section 13, broadly protects the right to engage in striking, picketing and other concerted activities, and it is only to the extent specifically and narrowly prescribed elsewhere in the Act, as in Section 8(b)(4), that such protection can be "diminished in any way." Sections 13 and 7 clearly call for a broad construction of their provisions and a narrow construction of Section 8(b)(4) so as to save wherever possible the right to strike, picket and engage in concerted activities for mutual aid and protection.

Not only did Congress not use language apt to accomplish what the Board contends was Congress' broad purpose, the language it did use in section 8(b)(4)(A) is very narrow and indicates on its face no broad objective of protecting all who might be affected by a refusal to handle the goods of a struck employer, but rather an intention only of protecting against involuntary (strike-induced) involvement of neutrals in the disputes of others—the forcing, through strike action, of third parties to boycott someone else.

Section 8(b)(4) in relevant part reads as follows:

> "It shall be an unfair labor practice for a labor organization or its agents * * * to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to . . . handle or work on any goods . . . where an object thereof is: (A) forcing or requiring . . . any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;"

From either a careful or a casual reading of the above language it is clear (1) that the section is directed against *unions* only and proscribes only a certain type of *union* activity in the secondary boycott field as distinguished from any *employer* activity in that field, and (2) that the only type of such union activity which is proscribed is the act of *striking* a neutral employer (or inducing the employees of the neutral employer to *strike*) in order to cause *that* neutral employer to cease doing business with another (usually the primary) employer. In other words, Section 8(b)(4)(A), by its clear terms, deals only with the *involuntary* (strike-induced) involvement of neutrals in labor disputes of other employers, and the only activity which is actually proscribed is *the forcing by strike action* of a particular employer to boycott someone else. No stretching of the language of the section can produce a prohibition against the act of a neutral *employer* in ceasing to do business with or handle the products of another employer when such act is voluntary or even when it is brought about through a union by any means other than coercion through actual strike action or inducement of a neutral's employees to strike.

If Congress had intended Section 8(b)(4)(A) to have the broad scope contended for by the Board, surely it would have used language which was less narrow than the carefully confined phraseology of Section 8(b)(4)(A). Basic to this entire case is the plain fact that in Section 8(b)(A) Congress has *not* proscribed voluntary employer assistance to unions engaged, as here, in a legitimate labor dispute, and has *not* attempted to outlaw anything other than the use of strike actions against a neutral employer to compel that particular employer not to deal with some other employer. That being the case, the Board cannot be heard to argue that under a "struck goods" agreement the parties are attempting to agree to something which the Act prohibits, or by indirection, to avoid some plain mandate in the Act.

E. The Legislative History of the Act as Well as What Congress Has Refrained from Doing Indicate No Broad Intent to Protect the Public Generally from the Effects of Boycotts.

1. The Legislative History.

As indicated by the Second Circuit in the *Crowley Milk case*, it is doubtful, in view of the clear language of Section 8(b) (4) (A), whether resort to legislative history to determine its meaning is appropriate. Even if it were, examination of that history in no way supports any contention that section 8(b) (4) (A) was designed to protect members of the public, customers and others that might be affected by a Union-induced refusal to handle goods, or that Congress intended to protect against anything but the forced involvement of neutrals in the boycotting of others accomplished by strike action against that neutral. A detailed examination of that legislative history has been made in the brief amicus curiae filed by the AFL-CIO, and therefore will not be attempted here. Suffice it for present purposes to state that that history demonstrates that Congress, under Section 8(b) (4) (A), intended to outlaw only one type of "secondary boycott," and that is the type of boycott, usually called an "employer boycott" under which union members strike a neutral employer to force him to cease doing business with or handle the products of some other employer, normally an employer engaged in a primary dispute.*

The constant reference made by Senator Taft and other floor leaders to the term "secondary boycott" without at-

*An employer boycott by a union, i.e., boycott of an employer because of his "unfair" activities, is to be distinguished from a consumer boycott under which a union induces its members and sympathizers to refrain from purchasing from or patronizing "unfair" employers. Even as to the employer boycotts Congress did not intend to outlaw all employer boycotts—it intended to outlaw only those which were effectuated through strikes or partial strikes against neutral employers. The references to the legislative history of the Act in *N.L.R.B. v. International Rice Milling Co.*, 341 U.S. 665-673, and accompanying footnotes, and in *Douds v. I.L.A.*, 224 F. 2d 455 (C.A. 2), make this point clear.

tempt at definition, must be taken in the light of the commonly understood and indeed court-defined definition of the term, as describing a situation where coercion against an unwilling third party is used to effect the boycott. See *Duplex Company v. Deering*, 254 U.S. 443 at 466, where secondary, as distinguished from a primary boycott, is defined as consisting of "a combination not merely to refrain from dealing with complainant, or to advise or by peaceful means persuade complainant's customers to refrain ('primary boycott'), but to exercise coercive pressure upon such customers, actual or prospective, in order to cause them to withhold or withdraw patronage from complainant through fear of loss or damage to themselves should they deal with it." Further discussion of the meaning of the terms "secondary boycott" and "employer boycott" is contained in the Economic Brief filed herein.

What the Board has done in its discussion of the legislative history was to attempt to assimilate the "struck goods" clause with a "secondary boycott" and then, because of the undoubted legislative aversion to the secondary boycott, assume that in outlawing the latter the hot cargo agreement was also outlawed. But there is no basis for thus grouping the two concepts; on the contrary, it is clear from the legislative history as a whole that the only type of "secondary boycott" with which Congress was concerned was the secondary boycott involving a *strike or partial strike* against some innocent third party neutral, under which that neutral *was forced* to cease doing business with some other person. See particularly, in this regard, the language of Senator Taft, set forth on page 23 of the Board's brief, where he refers to the chain reaction of *strikes* generated by the secondary boycott principle (83 Congressional Record, 4198, 2 Legislative History, 1107). The distinction drawn by the bill and by Section 8(b)(4), said Senator Taft, is between "*strikes*" for justifiable purposes and *strikes* for wholly illegal and improper purposes" such as "*strikes* in the nature of secondary boycotts" (93 Cong.

Rec. 3834, 2 Leg. Hist., 1005-1006). Summing up upon the bill's return from conference, he said (93 Cong. Rec. 6445-6446 in 2 Leg. Hist. 1544):

> "The conferees rejected the broad prohibition of all kinds of *strikes* . . . The only *strikes* which are declared to be illegal are secondary boycotts and jurisdictional *strikes*." (Emphasis supplied)

As stated by the Second Circuit in the *Crowley Milk* Case, supra (245 F. 2d at 822):

> "We also do not accept the argument that hot cargo clauses are against public policy. The advocates of this view ignore the statutory language to talk about "secondary boycotts" and the undoubted Congressional dislike of them. Having assumed that refraining from work described in a hot cargo clause is a "secondary boycott," they frame the issue in terms of whether a hot cargo clause is a defense to a Section 8(b) (4) unfair practice. We cannot agree with this characterization of the issue. There is no need for a "defense" unless there has been a violation; and in determining the latter question we look to the statutory language, rather than the vague concept "secondary boycott," about which the legislators sometimes talked, but which they did not write into the Act. For the reasons already given we hold that there is no "forcing," "requiring," "concerted refusal in the course of their employment," or "strike," and consequently no violation."

In view of the widespread and traditional use of these agreements throughout American industry, as set forth at length in the Economic Brief filed herein and as noted by the Board in its brief (pp. 26-30), and in view of the fact as further noted by the Board that the Congress must have been aware of the operation and effect of these agreements, it can reasonably be assumed that if Congress actually intended to proscribe them or restrict their use in any way, it not only would have given the matter considerable study and consideration, but also would have somewhere made specific reference to the fact that either Section 8(b) (4) (A) or some other section was designed to curtail the

use of such agreements. Yet the most significant feature of the legislative history is that nowhere in the statements of the leading Congressional proponents or opponents of Taft-Hartley or in any of the Senate or House Committee Reports thereon is there any express mention whatsoever made of the "struck goods" agreement as such, let alone any indication of an intent to outlaw or proscribe the use of these agreements or to render them unenforceable. Whatever reference to "struck goods" agreements or their use the Board has set forth in its brief (see particularly pages 23, 24) comes solely from witnesses hostile to labor and obviously prove nothing; if testimony of that nature can constitute proof of legislative intent, a basis could be found for outlawing almost all union activities. The Board cites the situation in the *Allen-Bradley* case (*Allen-Bradley Company v. Local Union No. 3*, 325 U.S. 797) as involving an element of employer consent. While that may be true, the situation there was far different from the situation where the employer has a greed to a "struck goods" clause to help a union cause. In *Allen-Bradley* the employers themselves were engaged in activities in violation of the Federal Anti-Trust Laws, and the union simple joined them so as to become a party to the conspiracy. In that case the employers agreed not to buy out-of-town goods, and the union agreed in turn not to install them, with the effect of giving the local contractors a monopoly on installation of the products involved. In *Allen-Bradley* this Court pointed out that if the goods shipped from out of state had not been installed as a result of a contract in which the employers agreed not to *buy* goods manufactured by companies which did employ members of Local 3, the non-installation of the goods would not have been illegal. Clearly, Section 8(b)(4)(A) does not make such a contract illegal. Therefore, it is obviously not true that Congress in Section 8(b)(4)(A) outlawed the abuse which it found in *Allen-Bradley*, if the abuse is regarded as non-installation of goods produced elsewhere as a result of

an agreement between the employer and the union. Just as Congress did not seek to reach restraints of trade which result from agreements between an employer and the labor organization representing his employees where those restraints are effectuated by non-purchase of the primary employer's goods, so did it not seek to reach restraints accomplished by non-installation, where the non-installation occurs pursuant to an agreement between the employer and the union representing his employees. In other words, Congress under Taft-Hartley totally eschewed the anti-trust approach which deals with restraints effectuated by agreement between a secondary employer and his employees, and restricted its prohibition to the anti-secondary strike approach.

2. What Congress Has Refrained from Doing.

Final and perhaps most conclusive evidence that Congress did not intend to proscribe "struck goods" agreements or their use is found in what Congress has specifically refrained from doing.

The discussion of the legislative history of the Act by the Second Circuit in the Conway case (Rabouin v. NLRB, 195 F. 2d 906, at 912) discloses that Congress expressly rejected a proposal to proscribe attempts by unions to involve neutrals by direct approach to the employer, as distinguished from his employees, i.e., to induce that employer by threat of strike action to boycott some other employer engaged in a primary dispute. Consistent with that legislative history, and with the express language of 8(b) (4) (A), the Board has repeatedly held in other cases that unions are free to seek to induce neutral *employers*, by any and all means, even including threat of strike action, to aid a union cause by refusing to handle or process the goods of another employer engaged in a labor dispute or by ceasing to do business with such other employer, and this reading of the Act has been universally upheld by the courts. *Sealright Pacific, Ltd.*, 82 NLRB 271; *Lewis Karlton d/b/a*

Consolidated Frame Company, 91 NLRB 1295; *Local Union 878, International Brotherhood of Teamsters, etc. (Arkansas Express, Inc.)* 92 NLRB 255; *Schatte v. International Alliance*; 182 F. 2d 158 (C.A. 9), cert. denied 340 U. S. 827; *Rabouin v. NLRB*, 195 F. 2d 906; *NLRB v. Electrical Workers, CIO*, 228 F. 2d 553 (C.A. 2), decided December 22, 1955.

In an effort to counteract the foregoing rule of law and, even more to the point, in an effort to outlaw in their entirely "struck goods" agreements, Senator Schoeppel of Kansas on February 15 1954, introduced a bill in the Senate to amend Section 8(b) (4) of the Act to accomplish those results. After extended discussion (see Cong. Rec. for May 6, 1954, p. 579), the Senate refused to take action. A similar bill (S. 3842) introduced by Senator Curtis of Nebraska on May 14, 1956 (84th Cong., 2nd Sess.) likewise met with no response from the Senate. Under such circumstances, the remarks of this Court in *United States v. International Boxing Club*, 348 U. S. 236 at p. 244, in respect to the significance of a similar legislative attempt to extend the coverage of the anti-trust laws are applicable:

> ". . . No further action was taken on any of the bills; Congress thus left intact the then-existing coverage of the antitrust laws. Yet the defendants in the instant case are now asking this Court for precisely the same exemption which enactment of those bills would have afforded. Their remedy, if they are entitled to one, lies in further resort to Congress, as we have already stated. For we agree that 'Such a broad exemption could not be granted without substantially repealing the antitrust laws.'"

See also the recent Supreme Court decision in *United States v. Bergh*, 352 U. S. 40, at 46 where it was held at:

> ". . . It is of importance to note that several efforts were made to repeal this interpretation by specific Act of Congress, but in each instance the bill failed to pass. This contemporaneous interpretation . . . *together with acquiescence of the Congress, must be given great weight.*" (Emphasis added.)

If, as contended by the Board, Congress was really concerned with protecting the public interests by eliminating disruptions to commerce and to the business operations of persons other than the struck neutral resulting from the termination of business dealings between such neutral employer and the primary employer, a number of very pertinent questions come to mind. The following are examples of the type of question which the Board has not and cannot consistently reconcile with its concept of the broad objectives of Section 8(b)(4)(A), and it is submitted that unless it can do so, the premise basic to its entire argument must collapse:

1. Why did Congress vote down provisions of the House bill (H. R. 3020, 80th Cong. 1st Sess.) which would have made it unlawful for unions to cause such disruptions by threats of a strike directed against a neutral employer himself?

2. Why did Congress leave unions free to attempt to induce customers of neutral employers to boycott the neutral for the purpose of forcing the neutral to stop dealing with the primary employer? *NLRB v. Electrical Workers, CIO, supra; Brewery & Beverage Drivers v. NLRB; (Washington Coca-Cola case)*, 220 F. 2d 380.

3. Why did not Congress by express and easily available language interdict the *voluntary* as well as the involuntary refusal on the part of neutrals to deal or do business with other employers engaged in separate labor disputes?

4. Why did not Congress directly outlaw the "struck goods" agreement as it directly outlawed the closed shop agreement under Section (8)(a)(3)?

5. Why did Congress, as recently as its 84th Session, refuse to deal with "struck goods" situations specifically brought to its attention?

6. Why did Congress in Section 8(b)(4)(B)[7] permit even a strike against a neutral for the purpose of bringing pressure on some other employer to recognize or bargain with the union in a situation where the union had been duly certified under the Act?

7. Why did Congress enact a proviso to Section 8(b)(4) of the Act[8] which, as stated by this Court in *NLRB v. Rockaway News Supply Company*, 345 U.S. 71, at 80 "clearly enables contracting parties to embody in their contract a provision against requiring an employee to cross a picket line, if they so agree"? While the proviso deals with a subject different from "struck goods" agreements—namely, the right of individuals acting on their own to respect picket lines established at another employer's premises—nevertheless, the implications of thus allowing an employer to make an agreement to that effect are significant. For what is the difference in either principle or effect on other third parties between an agreement by a carrier and the union representing his employees, permitting those employees to refuse to cross a picket line at a struck plant while in the process of picking up or delivering products thereto (sanctioned by the principle enunciated in *Rockaway* above), and an agreement between a carrier and the union representing that carrier's employees permitting those employees to refuse to accept goods delivered from

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[7] Subsection (B) reads as follows:

"(B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees *unless* such labor organization has been certified as the representative of such employees under the provisions of section 9;" (Emphasis added.)

[8] That proviso reads as follows: "*Provided*, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act."

a struck plant when a picket line has been established around the struck plant's truck (the *American Iron* situation in this case)? Unless it can be said that there is a distinction between refusing to cross a picket line to pick up goods at a struck plant or refusing to cross a picket line to pick up goods off one of that plant's trucks, the factual situations in the foregoing instances are identical, and in any event the resulting effect of the refusal on the public and other customers is the same.

8. Why did not Congress make some exception to the provisions of Section 301 of the Act to avoid the consequences of the right that section gives a union *(UE v. General Electric Corporation* 353 U. S. 547) to obtain enforcement of the terms of their collective agreements by suits in the nature of specific performance? The Board has at times (see page 21 of its brief before the 9th Circuit in the *Sand Door* Case) suggested that unions would still have the right to go to court to obtain enforcement of their hot cargo clauses, even if the union has no right to attempt to obtain such enforcement directly by inducing its members not to handle struck goods pursuant to the "struck goods" clause.

In all the foregoing eight situations, as far as the public is concerned, or as far as the customer of the primary employer is concerned, or as far as the operation of the business of other third parties, directly or indirectly affected by the refusal to handle goods of a struck employer, is concerned, the effect is the same. That is, the flow of commerce between the neutral and the primary employer is disrupted, and business operations of persons dealing with the neutral or the primary employer are interfered with, to exactly the same extent whenever the neutral ceases to do business with the primary employer, whatever the reason for the neutral's cessation of such business may be. Surely, if Congress intended to protect the general public from the consequences of a neutral's refusing to do business

with the primary employer, all of the above examples of permissible secondary involvement would have been outlawed, and surely the failure of Congress to take preventive measures in the above situations does not reveal the broad concern with the public interest contended for by the Board.

While the Board admits that a neutral employer is free to refuse to deal with or otherwise boycott other employers as a means of helping the union engaged in a dispute with that other employer, it nevertheless argues (Board brief, p. 51, quoting from the decision of the 9th Circuit in *Sand Door*, 241 F. 2d, at 153) that in such a case the employer's decision is voluntary so that an entirely different situation is presented when the union attempts to influence the employer's decision by a work stoppage. In the latter case, the Board argues, "There would be little chance that the union's boycott demand would succeed, with the resultant impact on other parties which Congress sought to avoid, if the union were unable to back up its demand on the employer by threat of work stoppage." But if it was the purpose of Congress to permit a neutral's decision to boycott another employer to remain free from union pressure, why did Congress deliberately choose not to outlaw a threat of strike against a neutral to force him to boycott? Certainly, such threats could constitute the severest form of pressure. And, aside from this inconsistency, it is inconceivable to suppose that if Congress were truly seeking to protect members of the public who might be affected by a boycott and not just the innocent neutral, it would have limited that protection so closely, or have drawn a distinction so hairline, so as to make illegal only the one narrow activity where the Union approaches the neutral's employees directly, leaving all other employer boycotts permissible—even those forced by threat of strike.

The argument that the Act was not so much intended to protect neutrals as it was to protect the general public "in the public interest" from the consequences of boycotts is obviously not borne out by the legislative history or by

the vast areas of boycott activity which Congress has left untouched. For this reason any quotations from the legislative history or from the Act itself, indicating that the Act was passed "in the public interest," prove nothing. All provisions of the Act were, of course, passed "in the public interest," but the language of Section 8(b)(4)(A), its legislative history, and what Congress has refrained from doing indicate that Congress deemed antithetical to the public interest only strikes against neutrals or inducements of a neutral's employees to strike for the purpose of forcing that neutral to boycott someone else.

II.

THE TERMS OF SECTION 8(b)(4)(A) AS APPLIED TO THE UNION ACTIVITIES IN THIS CASE

A. The Union's Activities in This Case Do Not Constitute a Violation of Section 8(b)(4)(A) Properly Construed.

1. The Implications of the Board's Argument.

We come now to the second of the Board's two major arguments, namely, the argument that if the provisions of Section 8(b)(4)(A) are construed broadly (as is required to accommodate the broad purpose of that section to protect the public generally), then the actions of the Drivers' Union in inducing its members to refrain from handling American Iron freight constitute a violation of that section, and this regardless of any employer acquiescence in such inducements or of any desire on the part of the employer to live up to his agreement not to allow his employees to handle struck goods. To agree with that argument involves acceptance of the Board's major premise of a Congressional purpose to afford over-all public protection against product boycotts. It also involves, as will be seen in the remaining portion of this brief, acceptance of an interpretation of the clear phraseology of Section 8(b)(4)(A) so twisted and tortured as to bring to mind the admonition

of this court in *NLRB v. Rockaway News Supply Company*, 345 U. S. 71, at 75, that "Substantive rights and duties in the field of labor management do not depend on verbal ritual reminiscent of medieval real property law." Finally, acceptance of that argument in the face of the element of employer acquiescence requires a willingness to disregard all common law and ethical concepts of the mutuality of contract obligations, and to ignore a basic purpose of the Act itself to foster and protect the collective bargaining agreement.

Let us first examine the implications of the Board's argument that the hot cargo clause in a collective agreement may be disregarded at will by the employer party thereto, and ever where that employer may desire to maintain the agreement, the union cannot be permitted to enforce it, at least by appeals to the union member beneficiaries to observe its terms. Heretofore in this brief, we have talked much of the validity of the "struck goods" agreement as such. But regardless of whether the question of validity is implicit in this case, and its resolution a necessary precedent to resolution of the question of union enforceability, *it must not be forgotten that this case is presented in a posture which assumes the validity of "struck goods" agreements as such and the right of unions and employers to enter into them under the Act.*[9] The actual holding of the Board here is that, regardless of the validity of "struck goods" agreements, it is unlawful for a union to attempt to obtain the benefit of that agreement by telling its members that "struck goods" are being delivered which they are under no obligation to unload, and this even though the employer involved is willing to fulfill his own commitments

[9] At the time of the Board's decision herein, all members but one agreed that "struck goods" agreements were valid, although at the present time, and since the decision of the Board in the *Genuine Parts* case, *supra*, only two of the Board's five members would hold such agreements to be legal.

not to allow his employees to unload. Thus, this Court is asked to subscribe to a doctrine under which an otherwise valid commitment, made in the give-and-take process of collective bargaining and for which a valuable consideration was presumably given and important concessions presumably made, can become unenforceable and a dead letter if the union for whose benefit the commitment was given asks its members to receive those benefits.

What the Board has really done in this case is to say that the employer is free to repudiate the very collective agreement which it is the purpose of the Act to encourage and protect. Section 1 of the Act declares it to be the policy of the United States to encourage "the practice and procedure of collective bargaining" and to protect "the exercise by workers of full freedom of association . . . for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." Section 7 of the Act grants employees the full right "to bargain collectively" through their chosen union and "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Section 301 of the Act provides special procedures for the enforcement of collective agreements, including their enforcement by specific performance. See *U.E. v. General Electric*, 353 U. S. 547. Can the Board's position in this case possibly be reconciled with these express declarations of the Congressional purpose to foster, protect and provide for the enforcement of agreements arrived at between unions and employers through the process of collective bargaining?

Board Members Murdock and Peterson, in their dissent in *Sand Door, supra,* commented on this concept of the sanctity of collective agreements under the Act as follows: "A contract does not consist of words on a piece of paper. It is a binding agreement between the contracting parties that requires them to behave toward each other in a specific

manner under a given set of circumstances, present or future."

The Board's concept of union unforceability of otherwise valid agreements, shocking as it is, is not made the less shocking by the suggestion that unions would have a remedy by suit for breach of contract in the state or federal courts. It is difficult to understand how a Board to whom Congress has assigned the task of smoothing the path of industrial relationships by the encouragement of collective bargaining can relegate such relationship to the processes of court litigation. A court of law is the very last forum where management and labor should seek to carry on their day-to-day relationships if industrial peace, harmony and cooperation are to be achieved. It is unthinkable that the Board's doctrine should be seriously contended for in any area of contractural relationships, but it is even more startling that it be contended for in the area of contract relationship growing out of collective bargaining. Perhaps more than anywhere else it is important in the field of industrial relations that the parties have complete confidence that their respective pledges will be lived up to as agreed upon.

Union contracts today are the product of many hours at the bargaining table, where each clause is agreed to only after much give and take between the parties, and for which valuable concessions are made. In the case of "struck goods," who knows what concessions in wage rates, conditions of employment, or health and welfare benefits may have been made by the union in order to obtain agreement? It can safely be assumed that they were substantial. Yet, the Board would allow, indeed encourage, the employer to repudiate this portion of the collective agreement at will. It is submitted that the Board, in so doing, acts in entire disregard of the most basic principles of fair play and mutuality of obligation and proceeds in entire

disregard of the declared purpose of the very law under which it purports to act.

Board Members Murdock and Peterson, dissenting in *Sand Door, supra*, 113, NLRB 1210, at 1224, characterized the Board's position as follows:

> "The decision of Chairman Farmer and Member Leedom encourages employers to violate their lawful agreements with labor organizations. Indeed it tells them that they may freely take whatever the union has given in collective bargaining to secure such an agreement without fear of ever having to pay the *quid pro quo*. It repudiates for an employer a voluntary agreement that he has never repudiated himself. It forbids a union, under penalty of the Board's injunctive processes, to assume that the employer meant what he said when he agreed in advance that his employees would not have to handle nonunion material. Such a decision gravely and adversely affects the collective bargaining process, which it is the duty of this Board to promote and encourage. In this respect, it does not serve the general welfare and does not effectuate the intent of Congress to minimize strife and establish peaceful collective bargaining in the field of labor relations."

Could Congress possibly have contemplated such preposterous results? One district court, passing upon a similar contention respecting union enforceability of "struck goods" agreements had no hesitancy in answering with an emphatic "no":

> "If the contracts are legal, it would be a paradox to hold that the unions are liable for damages for negotiating them and must respond under Section 187. If the contracts are legal, then there is no merit in a claim that the members of a union working under them cannot rely and act on their terms when the occasion contemplated by the contract term arises." (*Meier & Pohlmann Furniture Co. v. Gibbons* (D.C.), 113 F. Supp. 409, affirmed 233 F. 2d 296.)

The court below had the following to say concerning this aspect of the Board's argument:

> "If the hot cargo clause is not violative of Section 8(b)(4)(A), and we think it is not, such a ruling would in practical effect render nugatory the clause itself and would leave the employees without adequate remedy. * * * We are not impressed with the argument that other adequate remedies are open to the employees of the union. Such remedies as are suggested by the Board seem to us to be totally inadequate and not such as are contemplated by the agreement by the employer in the hot cargo clause. * * * It seems to us that the purpose of Section 8(b)(4)(A) is to prevent injury to secondary employers in the disputes of others in which the secondary employers are not involved, and to prevent the forcing of such employers to stop doing business with a third person. But, in cases like this one, the secondary employer has agreed, as part of its bargaining contract with its own union, not to handle goods of an unfair employer; and it would seem that Teamsters employed the only effective means in its power to enforce the agreement."

The only justification which the Board advances for its concept of the sanctity of the collective agreement is that enforcement of the "struck goods" clause, even with the full consent of the employer party thereto, would impinge on the rights of other third parties, such as customers, which rights Congress has sought to protect—a protection which neither of the contracting parties can waive—so that, as a matter of public policy, the union must be forbidden to attempt enforcement. We have seen that this assumption of what Congress intended is without validity and, absent that assumption, the Board's justification must collapse.

2. *The Elements of an 8(b)(4)(A) Violation.*

We turn now to the Board's argument (Board brief, p. 40 et seq.) that Section 8(b)(4)(A) must be construed and applied broadly, even beyond its literal terms, in order to accommodate what the Board deems to be the intent of

Congress to protect all persons from the effect of union-induced boycotts, and that, so construed, the particular activities of the Drivers' Union in the instant case constitute a violation of Section 8(b)(4)(A). In substance, the Board asserts that the element of the neutral employer's coercion or non-consent need not be present in order to find an 8(b)(4) violation; that any direct inducement by a union of union members not to handle "struck goods," even though with employer consent, is sufficient to establish the violation. Thus, under the Board's reasoning, there is no necessity for a showing that a strike or partial strike has taken place against the neutral and no need to show that it was an object of union activities directed against a neutral to *force* that neutral to stop doing business with someone else; it is sufficient to constitute a violation of Section 8(b)(4)(A) if third parties other than the neutral have been required, against their will, to cease dealing with someone else as a result of their refusal to handle.

Such an argument, it is submitted, flies in the face of the plain terms of Section 8(b)(4)(A) and cannot be justified even under the Board's basic premise that it was the purpose of Congress to protect the public generally, and most certainly not if that premise cannot be accepted.

Perhaps the shortest answer to this argument of the Board is found in the opinion of this Court in the case in which it first had occasion to examine Section 8(b)(4)(A) and determine its scope and purpose. That case is *NLRB v. Denver Building and Construction Trades Council*, 341 U.S. 675. At page 687 thereof, this Court stated that Section 8(b)(4)(A) "restricts a labor organization and its agents *in the use of economic pressure* where an object of it is to *force* an employer or other person *to boycott someone else*" (emphasis supplied). The phrase "economic pressure" would appear to denote a strike, or at least something more than activity to which the neutral employer had consented. The phrase "to force" the neutral employer

would seem to mean just what it says and not what the Board says. Finally, the phrase "an employer or other person to boycott someone else" implies something more affirmative than merely an inability to be able to deal with some other person as a result of, or as an indirect effect of, someone else's boycotting activities.

Let us pursue the above analysis in a little more detail and examine a little more closely the Board's attempt to stretch the plain language of Section 8(b)(4)(A). Such an examination will serve the purpose both of exposing the error in the Board's arguments and of demonstrating affirmatively that the Drivers Union's activities in this case did not constitute a violation of Section 8(b)(4)(A)—that such activities did not involve a *strike* or inducement to *strike;* that any inducement not to handle did not occur *"in the course of their (the carrier's employees'), employment";* that there was no *forcing* the carriers to cease handling American Iron and Freight; and, finally, that it was not an *object* of the Union's inducements to force the carriers to cease handling American Iron and Freight, but rather its object was to obtain compliance with its agreement. Thus, it will be seen that there is absent in this case not only one but all of the elements of an 8(b)(4)(A) violation.

3. *The Element of Strike or Similar Coercion Against the Neutral Is Not Present in This Case.*

The Board argues (Brief, page 42) that the term "strike or concerted refusal" as used in Section 8(b)(4) can include action which is not contrary to an employer's will and can occur whenever a union requests its members not to perform a work task. The "significant fact," says the Board, is "that" the union has encouraged it." This argument goes even a step further than the position taken earlier by the Board in "struck goods" litigation that "literally the 'concerted refusal' phase proscribes inducing employees to refuse, while at work, to perform a task which

they would have done absent the inducement" (the Board's brief before the Ninth Circuit in the *Sand Door* case, page 24).[10]

This argument of the Board again ignores the plain language of the Act and its legislative history. The key word in the portion of Section 8(b)(4)(A) here under discussion is the word "strike." The meaning of that word is clear enough; there must be the coercion of a strike, not any refusal or refusal absent coercion. What the Board refuses to recognize is that the succeeding phrase, "concerted refusal," when taken in context with the entire expression "concerted refusal in the course of their employment to . . . handle any goods . . . or to perform any services," does not include any type or act of refusal but only an act of refusal which is tantamount to strike action or to partial strike action. It was necessary to include a partial strike among the proscribed means in order to reach the so-called "product boycott" which, as seen by the discussion of the legislative history of the Act, *supra*, it was the principal purpose of Congress to prevent. In the case of a "product boycott" of struck goods, for instance, the employees involved would refuse to work only at such times as struck goods or unfair goods came to them for loading, unloading, or otherwise handling, and during the remainder of their working day they would continue to work, or they might turn to other work and work throughout their working day. Thus, what they did may not have been embraced under the ordinary concept of what constitute a strike, and may have constituted only a corrected refusal to work at a particular period during their day's employment.

[10] Although this latter point is not pressed in its present brief, nevertheless, it can be asked how the Board can possibly assume that the employees in the present case would have done the work in question "absent the inducement," after it had been brought to their attention that certain freight was from a struck firm when it had already been agreed by their employer not only that they would not be required to perform this work but also that they would not be "allowed" to.

The language of Section 8(b)(4)(A) was carefully drafted to reach these partial strikes, as well as total strikes. The phrase "concerted refusal" of "the employees of any employer" to perform "work" or render "services," far from being an original formulation, is the dictionary definition of "strike." See Webster's New International Dictionary, p. 2496; Black's Law Dictionary, 1951, p. 1591; American College Dictionary (Random House, 1952), p. 1198, definition 60. But a strike, whether full or partial, necessarily involves an element of coercion or action contrary to an employer's will. A strike contemplates an act of insubordination under which union members, acting in concert, refuse to perform their customary services. A strike is the concerted withholding of labor for the purpose of obtaining the employer's accession to a demand which he is resisting. It is the employees' cessation of "work at their own volition because of the failure of the employer to meet their demands."[11]

Thus, in context, the term "refusal" refers to "a concerted insubordination" in the nature of a strike which the Board and the Second Circuit in the *Conway* case referred to and which the Board and the courts have followed since Taft-Hartley was enacted.

The Board itself, in its brief before the Second Circuit in the *Conway Express* case, expressed what we are trying to say here respecting the type of economic pressure which is embraced under the term "strike or concerted refusal to work" as well as we have ever seen or heard it expressed:

> "In these circumstances, the refusal of the employees to handle Rabouin's freight was not a strike or a concerted refusal to work induced by the Union in violation of Section 8(b)(4)(A). A strike is the concerted withholding of labor to gain the employer's accession to a demand which he is resisting. It is the employees' cessation of 'work at their own violation because of the

[11] *N.L.R.B. v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 256.

failure of the employer to meet their demands.' In this case, however, the employees' refusal to handle Rabouin's goods was not in opposition to their employer. It was in keeping with the advance agreement of each employer, not repudiated but acquiesced in throughout. Thus, the indispensable prerequisite of a strike—a demand which the employer resists and for which the strike is called—is missing. *A refusal to work in which the employer concurs can hardly be called a strike against him.*" (Emphasis added.)[12]

Since under a "struck goods" clause the employer has agreed in advance that the employees will not handle "struck goods," there can be no coercion, no insubordination, no refusal to perform customary services because

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[12] From the time Taft-Hartley was enacted until its decisions in *McAllister, Sand Door* and the instant case, the Board, with judicial approval, adhered to this construction of the term "concerted refusal" as used in Section 8(b)(4). In its Brief to the Supreme Court of the United States in *NLRB v. International Rice Milling Co.*, 341 U. S. 665 (p. 29), the Board stated that what a labor organization is forbidden by Section 8(b) (4) to do is "to direct its pressures against a neutral employer by depriving him of the services of his own employees." In its brief in *NLRB v. Denver Bldg. and Construction Trades Council*, 341 U. S. 675 (p. 22), the Board said that what Section 8(b) (4) (A) forbids is "strike action directed against an employer who is not in a position to grant the Union's economic or organizational demands, i.e., a neutral or 'secondary' employer." The Supreme Court agreed. Explaining why in the *Rice Milling* case the Union's inducement of employees of a neutral not to cross the picket line did not fall within the prohibition, the Supreme Court said: "The Union did not engage in a strike against the customer. It did not encourage concerted action by the customer's employees to force the customer to boycott the mill." *NLRB v. Denver Building & Construction Trades Council*, 341 U. S. 675, 687-688. See also the Board's decision in *Sealright Pacific, Ltd.*, 82 NLRB 271, 291, and *Schultz Refrigerated Service*, 87 NLRB, 502, 508.

This "contemporaneous construction of [the] statute by the men charged with the responsibility of setting its machinery in motion; of making the parts work efficiently and smoothly while they are yet untried and new," if not conclusive, is at least entitled to great weight. *Norwegian Nitrogen Co. v. United States*, 288 U.S. 294, 315.

there can be no refusal of something which is not even demanded or which could not legitimately be demanded; it cannot be said that the handling of such "struck goods" is part of the employees' customary or expected services, or are services which the employer can require his employees to perform under their contract of employment, or are services which he could have expected his employees to perform "absent the inducement." Indeed, as pointed out by Board Members Murdock and Peterson in *Sand Door*, 113 NLRB 1210, far from constituting a strike or other act of insubordination, the action of a union either in calling a "struck goods" clause to the attention of its members or otherwise inducing them to seek the benefits of the clause by refraining from handling "struck goods" would seem to constitute the discharge of a duty of the union to keep the employees it represents informed at all times of their rights under the contract, including pointing out the fact that the handling of "struck goods" is not within the scope of their employment.

The legislative history of the Act also confirms the conclusion that Congress sought to interdict a *strike*, or something in the nature of a *strike*, directed against an innocent neutral. As indicated earlier in this brief, Senator Taft and other Congressional leaders repeatedly expressed their disapproval of *strikes* against neutrals, and all of the examples of secondary activity include some form of *strike* action or of a refusal to work taking place contrary to a neutral employer's wishes.

Finally, as discussed earlier (*supra*; p. 29) this Court in the *Denver Building Trades* case made express reference to the element of "forcing" an employer to boycott someone else, so that coercion must be considered an element.

The Court of Appeals for the Second Circuit in the *Crowley Milk* case, *supra* 245 F.2d at 820, 822, made the following cogent answer to the contention of the Board that there need be no element of employer coercion:

"The statutory language is clear: there is no violation of §8(b)(4) unless the union encourages the employees to *coerce* the secondary employer. Where the employees are encouraged only to exercise a valid contractual right to which the employer has agreed there is no coercion. Normally the secondary employer receives something at the bargaining table in exchange for granting the hot cargo clause, and he is no more coerced when the employees subsequently exercise their privilege than a landowner is coerced when those to whom he has granted licenses cross his land.

* * * *

"In this most recent statement [the majority of the Board in *Sand Door* to the effect that there is still an 8(b)(4) violation even though the employer acquiesces in the refusal to handle] the reaction of the secondary employer has become wholly irrelevant, and there is still no explanation as to how the majority supplies the missing element of 'coercion.' Although only this latest position is urged upon us by the Board, we have considered both it and Chairman Farmer's original version and rejected them both. The latest Board view fails to distinguish between instances of employer coercion and instances of employer consent."

In its earlier decision in *Conway Express (Rabouin v. N.L.R.B.*, 193 F.2d at 908) that same Court stated as follows concerning the necessity of showing some strike-induced coercion as a prerequisite to the application of Section 8(b)(4)(A):

"Petitioner also sees in the union's pressure on neutral employers to stop accepting his shipments a violation of the secondary boycott provisions. § 8(b)(4)(A). Even if the demands carried with them an implicit threat to strike, we cannot agree that they tended to induce or encourage the employees to engage in a strike or concerted refusal forcing the employer to cease doing business with another. The embargo on Rabouin's goods was the product solely of requests addressed to management or supervisory personnel. The former are clearly employers, and the latter have

lately been so defined by the new § 2 (2, 11), 29 U.S.C.A. § 152 (2, 11). The union thus did not 'encourage the employees'.

"Nor did it bring about the strike or concerted activity prohibited by § 8(b)(4)(A). See *N.L.R.B.* v. *International Rice Milling Co.*, 341 U.S. 665. Petitioner urges us to read into this formula an additional proscription of threat of sanctions against third parties, arguing for this as an interpretative device to make the section workable. Perhaps such an interpretation would have been justifiable or desirable were this a new statute of less general significance. But in a matter of such bitter controversy as the Taft-Hartley Act, the product of careful legislative drafting and compromise beyond which its protagonists either way could not force the main body of legislators, the courts should proceed cautiously. For it would appear that Congress has already spoken in this regard. The House version of the bill, H.R. 3020, 80th Cong., 1st Sess., incorporated the rule against threat to strike the petitioner would have us adopt, in §§ 2(14), 12(a)(3); but the present phraseology is the product of a joint conference wherein the Senate's draft to the contrary was adopted. 1 N.L.R.B., Leg. Hist. of the Labor-Management Relations Act 42, 112-113, 168-169, 204-205, 240, 546, 547. See *Schatte* v. *International Alliance, etc.*, 9 Cir., 182 F. 2d 158, 165, certiorari denied 340 U.S. 827, construing similarly the parallel wording of § 303, 29 U.S.C.A. § 187. We should not interpolate into the Act restrictions against union activity which Congress has purposely deleted, *N.L.R.B.* v. *National Maritime Union of America*, 2 Cir. 175 F. 2d 686, 690; certiorari denied *National Maritime Union of America* v. *N.L.R.B.*, 338 U.S. 954.

"The union cannot have committed an unfair labor practice under this section in regard to those employers who refused to handle Rabouin's shipments under the terms of the area agreement provision relating to cargo shipped by struck employers. Consent in advance to honor a hot cargo clause is not the product of the union's 'forcing or requiring any employer . . . to cease doing business with any other person.' § 8(b)(4)(A)."

The Court below similarly found it impossible to conclude that in the circumstances of the present case there was any strike or other refusal to work or any forcing of any employer to boycott someone else:

> "Here the Teamster's conduct only consisted of urging the employees of the carriers not to handle freight from a company which they considered unfair. This was exactly what the carrier had agreed their employees would not be required to do. If an employer may lawfully agree that its employees will not be required to handle freight from a struck company, and such a situation arises, it is hard to see how it can be said that, simply because the employees do what they have the right to do, there was a strike or refusal to work. Nor can it be said that there was a "forcing" or requiring of an employer to cease doing business with another person, because the employer was only being compelled to live up to its own voluntary contract entered into in advance of the happening."

It would appear clear from the foregoing that at least one important element of Section 8(b)(4)(A)—encouragement of employees to engage in a *strike* or concerted refusal to handle goods in the nature of a *strike*—cannot be said to be present when the union party to a "struck goods" clause invokes it by appeal to its members, and this even though the employer repudiates the clause and asks his employees to disregard their rights under their agreement by handling the "struck work" despite his commitments. Even if the employer repudiates, still, unless the Board is to condone such repudiation, consent had in fact been given in advance, which consent must be taken as having some legal effect for the term of the contract.

4. *The Element of a Refusal "in the Course of Employment" Is Not Present Because the "Struck Goods" Clause Took the Loading of American Iron Freight out of the Area of Employment.*

A second necessary element in the application of Section 8(b)(4)(A) is here absent, for it cannot be said the "refusal" of the dock employees to unload American Iron

freight was made "in the course of their employment" as required by that section. This is so because the "struck goods" clause involved in this case not only removes from the area or scope of the required duties or functions of the carriers' employees all work involving the handling of "struck goods," but goes even further in saying that the carriers *shall not "allow"* their employees to handle any "struck goods."

In addition to requiring disobedience of orders in the nature of a strike under Section 8(b)(4)(A), Congress took pains to assure that disobedience would be unlawful only if the orders involved were ones which the employer could properly issue within the confines of the particular employment relationships. To accomplish this result, Congress added the phrase "in the course of their employment." That phrase would have been wholly superfluous if Congress had desired to extend the reach of the section to any activity in which the employees engaged *qua* employees. For the preceding limitations of the prohibition to inducement of "employees" amply sufficed to preclude its extension to acts performed by employees in other capacities, *e.g.*, as private consumers or as "agents" of their employer.

Congress did not, of course, define the "course of employment" for all or any particular employees. It left that function where it has always been, in the employer and his employees or their bargaining agent. *Cf.* Section 8 (d). Ever since there has been such a thing as collective bargaining, it has been the practice to specify in the collective agreement, often in great detail, exactly what work tasks or duties will or will not be required of employees; indeed, when pursuant to collective action, employees agree to accept employment, a prime consideration is the scope of the employer-employee relationship. Suppose, for instance, that, as often happens, it is specified that production employees shall not be required to do the work of supervisors or, conversely, that supervisors will

not be employed to do production work or to work with the tools of the trade. Would a refusal on the part of the individuals involved to do the proscribed work on request of their employer constitute a refusal in the course of employment, or if the refusal was union-induced, would there be an 8(b)(4)(A) violation? Obviously not. Similarly, as noted in the brief for petitioners in Case 127, p. 26, it is common practice to agree that employees will not be required to work under certain unfavorable or unsafe conditions or that employees will not be required to use certain types of tools, yet it has never been urged that such agreements amount to a secondary boycott. Or suppose restrictions on doing certain types of heavy work or other unsuitable work are inserted in collective agreements, as is often the case in respect to female employees. Does the refusal to do that work upon request constitute the refusal contemplated under Section 8(b)(4)(A)? Again, obviously not. These examples cannot be differentiated from the hot cargo agreement involved in this case. Indeed, the argument here is even stronger because the agreement states not only that the employees shall not be required, but they shall not be *allowed* to do certain work.

In the case of the "struck goods" clause as well as in the case of all the other examples cited above, it has simply been provided that the work in question shall not be part of the job of the employees. It follows that the refusal to perform that job cannot be considered a refusal "in the course of employment," and there can be no 8(b)(4)(A) violation. Prior to *Sand Door* and the instant case, the Board expressly so held. *Pittsburgh Plate Glass Co.*, 105 NLRB 740, 744; see also, *Rabouin v. NLRB*, 195 F.2d 906, 912 (C.A.2). To the extent that some of the present Board members have attempted to say that employees through their union cannot attempt to arrange their own conditions of employment and specify the contents of their jobs, it would appear that they have arrogated to themselves authority to supersede arrangements as to work assign-

ments made by private parties through the statutory procedure of collective bargaining with arrangements which these members regard as preferable. This Court, in *American National Insurance Co. v. NLRB*, 343 U.S. 395, has held that the Board has no such authority. *Cf. N.L.R.B. v. Rockaway News Supply Co.*, 345 U.S. 71, at 79.

The Board argues (Brief, p. 45) that the phrase "in the course of their employment" was intended to distinguish between employees in their capacity as employees and employees in their capacity as consumers. The answer to this contention is well set forth by Board Members Murdock and Peterson in the *McAllister* case, *supra*:

> An examination of the legislative history of Section 8(b)(4)(A) does not disclose that Congress intended to attach any special meaning to the words "in the course of employment." Therefore, while we do not say that the interpretation which Members Rodgers and Beeson would give to the phrase is lacking in merit, we cannot agree that their construction is any more an expression of Congressional intent than was the Board's interpretation in the *Pittsburgh* case. As Members Rodgers and Beeson suggest, the phrase may be "simple" and there may be "nothing esoteric about the language," but the fact of the matter is that it is susceptible to different interpretations. We believe the Board's interpretation as set forth in the *Pittsburgh* case is the more plausible and correct one. We note that such courts as have had occasion to pass upon the language have accepted that interpretation.

5. The Element of "Forcing Or Requiring" the Carriers to Cease Dealing with American Iron Cannot Be Present When Those Carriers Had Already Committed Themselves Not to Do Business with That Company.

A final element necessary to the application of Section 8(b)(4)(A) which cannot be said to be here present is that it was an object of the Drivers Union's inducement herein "to force or require" the neutral carriers to cease doing business with American Iron. We have already seen

that this Court in the *Denver Building Trades* case (341 U.S. at 687) has stated that that section is applicable where it is an object of the union "to *force* an employer or other person to boycott someone else," and see the quotations from the decisions of the Second Circuit in *Conway Express* and *Crowley Milk* cases, and from the Court below in *American Iron*, *supra*, p. 35. It cannot be said in the instant case that there is any "forcing" of the neutral carriers to boycott American Iron when those carriers had already committed themselves not to do business with that company if it became involved in a labor dispute, indeed, had pledged themselves that they would not allow their employees to handle American Iron goods for shipment in that event.

The Board, while agreeing that under a "struck goods" clause there can be no "forcing" of a neutral employer whose employees have been asked not to handle the goods pursuant to their contract, argues that there is a forcing of other persons such as customers who might want to do business with American Iron but are prevented from doing that business because of the boycott. This argument, however, is again predicated on the assumption that 8(b)(4)(A) was intended to give protection to the public in general against the effect of boycotts and that the phrase "other person" means all other third parties. We have already demonstrated the fallacy of this assumption.

The Board also argues that the word "requiring" in Section 8(b)(4)(A) is applicable even though the word "forcing" is not, because even if the carrier acquiesces, his employees' refusal to handle the product necessarily curtails the carriers' continued right to handle the "struck" goods of American Iron. But this forgets that the employer by formal contract *has already foregone the right* to use that product or to handle such goods.

Thus, there is only one premise on which the Board's argument in this connection can make any sense at all, and

that is on the premise that it is the Board's function to condone, indeed encourage, an employer to breach or disregard or ignore his own solemn commitments. We have seen that such a concept offends the moral sense, is contrary to all concepts of contract law, and contravenes the general policies of the Act. It is difficult to believe that this Court would countenance for a moment any such administrative policy of condoning contract repudiation. Rather, we think this Court will agree with the following observations of Board Members Murdock and Peterson dissenting in the *McAllister* case, *supra:*

> "Moreover, we are not at all convinced that where an employer has, in fact, repudiated a 'hot cargo' contract the Board should countenance such conduct. If a 'hot cargo' contract is valid—and the Board and Courts, as we have indicated, have said that it is—we question whether the Board should approve a breach by one party which subjects the other party to a finding that the latter has violated the Act. We do not consider it a proper function of this Board to disregard the sanctity of valid contracts nor are we aware of any other situation where the Board has espoused such a view. Certainly, if a union and an employer entered into a contract containing a valid union security clause, and the employer, in effect, repudiated the agreement by refusing the union's request to discharge an employee for nonpayment of dues, the Board would not find that the union had violated Section 8(b)(2) of the Act. Similarly, it would seem that where an employer has actually repudiated a 'hot cargo' contract, the Board should find that the union has not violated Section 8(b)(4)(A). For these reasons, we cannot agree with the Chairman's view that emphasis should be placed upon the 'entire course of conduct' rather than the provisions of the contract itself."

6. *The Object of The Union's Appeal to Its Members Was to Obtain Compliance with The Agreement; There Was No Evidence of An Illegal Object to Force the Carrier to Cease Doing Business with American Iron.*

Finally, any forcing or requiring must have a direct, not

an incidental object of requiring the neutral employer not to handle the goods of another. However, here the direct and, indeed, the only object of the union's action in asking its members to observe the "struck goods" clause was to obtain the benefits of that clause for those members (i.e., to preclude their being used in any strike-breaking capacity), as already agreed to by the employer. It is only as an incident of employer compliance—a compliance required by the law of contract—that the employer would stop doing business with American Iron.

Since, as we have seen, the union had a right to define the terms of employment of its members, and since it had in fact obtained the pledge of the carriers that they would not allow union members to handle struck goods, when the carriers refused to abide by their agreement and the union asked its members nevertheless to refrain from unloading the American Iron freight, the union's immediate and direct object was to obtain compliance with the agreement, that is, see to it that its members did not have to act, if not as strike-breakers, at least as allies of a struck employer as they had been promised when they took employment. When the situation contemplated by the agreement materialized and the carriers refused to comply with their agreement, the union took the most readily available means of enforcing the agreement; it could hardly be expected to await court litigation. The fact that the American Iron Company happened to be the employer engaged in a strike so that its freight and not that of some other employer was involved was purely happenstance. Any one of a hundred other employers doing business with the carriers might just as well have been involved, and there was nothing in the relationship between the American Iron Company and the Drivers Union which would give that union any reason for desiring to boycott it rather than some other employer. And for that matter, the carriers could have handled American Iron freight with supervisors

or even have utilized American Iron employees. All that the Drivers Union was concerned with was to see to it that the work required of its members was limited to the area described in the collective agreement. Surely the union's actions were more consistent with the desire to relieve its members of the necessity of acting in a strike-breaking capacity and in obtaining fulfillment of the carriers' pledges to this effect than with a desire of forcing the carriers to boycott American Iron.

Section 8(b)(4)(A) does not make concerted activities illegal merely because one of their concomitants or consequences is to terminate business relations between parties to a labor dispute and their customers, or even between two neutral parties. If it did, all picketing would be outlawed. See *N.L.R.B. v. International Rice Milling Co.*, 341 U.S. 665; *Sales Drivers, Helpers & Building Construction Drivers, etc. v. N.L.R.B.*, 97 U.S. App. D.C. 173, 229 F.2d 514; *N.L.R.B. v. Teamsters Local 968* (C.A. 5), 225 F.2d 205; *Oil Workers International Union v. Pure Oil Co.*, 84 NLRB 315. And see the brief of petitioners in Case 127, pages 14, 17, and 29 particularly, where the failure of the Board to distinguish between the "effect" of concerted activity and concerted activity undertaken for the particular "object" proscribed in the Act is commented upon. An illegal object cannot be inferred merely because it is one of the consequences of a course of action taken pursuant to a principal and valid object. This important distinction has recently been amplified by Judge Learned Hand, speaking for the Second Circuit, in *Douds v. International Longshoremen's Association*, 224 F. 2d 455, 459 (cert. denied 350 U.S. 873), where he stated:

> "It is indeed true that this [cessation of business between trucking concerns and their customers, who were neutrals in the labor dispute] was one of the probable, nay perhaps, inevitable, consequences of the refusal [of the Union's members to serve the trucks]; but the liability imposed by the section is much more limited than the usual liability for a tort, which extends

to any damage that the tortfeasor should reasonably have expected to result from his act. All strikes and 'concerted refusals' to work involve some cessation of business; that is the only sanction they can have. When Congress limited the wrong to occasions when the cessation was an 'object' of the conduct, it excluded much indeed that the ordinary law of tort would have included. If it had not done so, it would have made nearly all strikes unlawful. The 'object' of an action is the concluding state of things that the actor seeks to bring about; that which satisfies his aim. Hence it is a term relative to the whole sequence of steps that he proposes; and it does not apply to those that are only intermediate to it. If I wish to enter my house, but can do so only by passing through my garden, my 'object' is to enter the house, and it is not a subsidiary 'object' to pass through the garden. On the other hand, if I find the garden gate locked, and I take out my key, the 'object' of my doing so is open the gate, though it is still only a step towards entering the house. So in the case at bar, if the respondents' refusal to serve the trucks was merely to cause a cessation of business between the 'Association' and the trucking companies or between those companies and their customers, that may have been within the section, though not even that is perfectly certain as will appear. On the other hand, if the refusal was a part of the struggle for control of the Port, that was the only 'object' in the sense that the term is used in the section, unless it is to cover all acts in a labor dispute that are known and intended to result in a cessation of business between others."

In *N.L.R.B. v. Houston Chronicle Publishing Co.*, 211 F.2d 848 (C.A. 5, 1954), a labor relations case where the respondent was an employer rather than a union, that Court held:

"When the Board could as reasonably infer a proper motive as an unlawful one, substantial evidence has not proved the respondent to be guilty of an unfair labor practice."

In the instant case there is no actual evidence, not to speak of substantial evidence on the whole record, that

the union or any of its agents had an unlawful object. "The burden 'was upon the Board to prove its charges by competent and credible evidence and not upon the Respondent to disprove them.' *National Labor Relations Board v. Ray Smith Transport Co.*, (C.A. 5), 193 F. 2d 142, 144." (Quoted in *N.L.R.B. v. Reynolds & Manley Lumber Co.*, 212 F.2d 155, 158 (C.A. 5, 1954). See also Administrative Procedure Act, 5 U.S.C.A. §1001 *et seq.*, and *Sales Drivers, Helpers & Building Construction Drivers Local Union 859, etc. v. N.L.R.B.*, 97 U.S. App. D. C. 173, 229 F.2d 514, and *Universal Camera Co. v. N.L.R.B.*, 340 U. S. 474.

III

The Status of the "Struck Goods" Clause under the Interstate Commerce Act Cannot Affect Its Validity under the National Labor Relations Act.

The Board's final argument (Brief, p. 55) advances a new concept of illegality, namely, that "struck goods" clauses, at least when involving an interstate common carrier, must be considered legally ineffective under Taft-Hartley because they conflict with the provisions of the Interstate Commerce Act. This is a concept of illegality which, prior to the Board's recent decision in the *Genuine Parts* case, had never even been referred to by any of the many Board members who have had occasion to consider the "struck goods" issue. Inasmuch as this concept was not litigated below and forms no part of the decision which the Board here seeks to overturn, we will not undertake any extended analysis and refutation of such argument or of the views of Board Members Leedam and Jenkins in the *Genuine Parts* case (Board's Brief, p. 89, *et seq.*), but instead refer this Court to the arguments in rebuttal appearing in the minority opinion of Board Member Murdock in that case (Board Brief, p. 126, *et seq.*). We cannot refrain, however, from noting some of the difficulties that are implicit in the Board's most recent argument.

(1) Insofar as the employees involved in the present case

are concerned, it is questionable whether they or their activities are subject to I.C.C. regulation. Ordinarily, dock employees engaged in moving, loading, and unloading freight on the dock are not. (See Commerce Clearing House, Federal Carrier Reporter, Para. 18002-18025 where the applicable cases are cited.)

(2) It is not any proper function of the Board to attempt adjudications in the area of I.C.C. jurisdiction. Because the Interstate Commerce Commission may find that a "struck goods" clause does not operate to excuse a carrier from the duty prescribed in the Interstate Commerce Act to accept or deliver freight, it would not necessarily follow that either the clause itself or union activities to enforce it constitutes a violation of the National Labor Relations Act, as amended. The one Act (I.C.A.) establishes certain duties which, depending on the circumstances of each particular case, the carrier may or may not have breached, or in respect to which certain union activity may or may not constitute a defense to a claim of breach. Taft-Hartley on the other hand establishes certain employee rights in the field of labor relations and prohibits certain specific union and employer activities in that field; which is a field quite different from and much broader in scope than the field of common carrier responsibility. As stated by Board Member Murdock in *Genuine Parts* (Board Brief, p. 132):

> "Comity between governmental agencies does not require that the ICC find a common carrier in violation of the ICA because the Union representing its employees has engaged in a secondary boycott affecting the operations of the common carrier. Comity does not require that the Board find a union's conduct, otherwise lawful, unlawful under Section 8(b)(4)(A) because a common carrier has, at the union's request, violated the provisions of the ICA."

As further pointed out by Board Member Murdock in that case, it is the function of the Commission to decide whether a carrier in refusing freight, has acted "reason-

ably" regardless of the legality or illegality of his contractual commitments and regardless of the legality or illegality of union activities in the light of which the carrier has taken certain action. Thus, the Commission can conceivably find that a carrier has failed to fulfill his duties and has acted unlawfully because he has refused to transport freight as the result of a lawful strike of his own employees—the Commission might determine that the carrier should have obtained replacements or taken some other course of action to see to it that its customers were accommodated. Would the Board on that basis then hold that such a strike, specifically protected under Section 13 of Taft-Hartley, is nevertheless unlawful under that Act? We think not.

(3) Although the Interstate Commerce Commission has recently had opportunity to pass on the issue of the legality of "struck goods" under the Interstate Commerce Act, it expressly declined to make any such determination on the ground that it lacked jurisdiction, such determination being exclusively for the National Labor Relations Board under the Taft-Hartley Act. *Galveston Truckline Corp. v. Ada Motor Lines, Inc.*, MC-C-1922, decided December 18, 1957. It there stated:

> "In its exceptions, Associated Industries of Oklahoma, while agreeing generally with the conclusions of the examiner, urges that we should go a step farther and declare these hot cargo clauses illegal as being in direct conflict with the obligations of common carriers to serve the public indiscriminately. We cannot accept this view. The agreements between carriers and labor organizations affecting labor relations between employers and employees are matters which Congress has seen fit to entrust to the supervision of the N.L.R.B., and we lack the jurisdiction to consider the legality or propriety of such agreements."

This being so, it surely would not constitute any function of or be within the province of the National Labor Relations Board to attempt to make adjudications on behalf

of the Interstate Commerce Commission; the fact that the Interstate Commerce Commission also held by way of dictum that the "struck goods" clause may not, depending on the particular circumstances in a particular case, constitute a defense to a carrier's refusal to transport certainly affords no basis for a flat holding that such agreements are illegal or unenforcible under Taft-Hartley.

(4) There is nothing in the language of the National Labor Relations Act, as amended, and nothing in its legislative history which makes any distinction between common carriers and other types of employers which come under the Act's provisions. On the contrary, Section 10(a) of the Act expressly prevents ceding of jurisdiction over the "transportation" industry except when local in character. From this, it is clear that Congress intended to make common carriers equally with all other employers subject to all protections as well as all prohibitions of the Act. Indeed, since most transportation—all by railway and air—is covered by the Railway Labor Act, Congress must have had the common and contract carriers by motor vehicle specifically in mind when it manifested this intent.

(5) Under the Taft-Hartley Act, Congress undertook to legislate broadly and definitively in the entire field of labor relations and establish therein certain rights, duties, and prohibitions. *Amazon Cotton Mill Co. v. Textile Workers Union*, 167 F.2d 183 at 186, and, as stated by this Court in *Garner v. Teamsters Union*, 346 U.S. 485 at 490:

> "Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules. . . . A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law."

Since, as we have seen, Congress did not see fit to outlaw the "struck goods" agreement and since Congress presum-

ably desired to permit the continuance of this traditional device along with other traditional types of labor activity not expressly proscribed, such clauses must be deemed to stand protected under the Act as a means of accomplishing, along with protection of the rights of striking and picketing, the Act's ultimate objectives, and this even though disruptions to commerce might result, as in the case of strikes or picketing, from the exercise of that right.

Indeed, Congress went even further to evidence its intention that rights and obligations created under the National Labor Relations Act shall stand as paramount. Section 10(a) of the Act specifically directs that the jurisdiction and power of adjudication of the National Labor Relations Board "shall not be affected by any other * * law * * *." Accordingly, since Congress legislated broadly and exclusively in the field of labor relations under Taft-Hartley at a date subsequent to the date it legislated in respect to the operations of the Interstate Commerce Commission, it would appear reasonable to infer that union activities and practices which are legal under Taft-Hartley continue to remain legal regardless of how the Interstate Commerce Commission may regard such practices or activities under the provisions of the Interstate Commerce Act.[13] Indeed, to the extent that union practices and activities are legally protected under Taft-Hartley (*Cf. Garner v. Teamsters Union, supra*), it can well be said that their exercise may give reasonable excuse for failure to perform what might otherwise be a common carrier duties under the Inter-

[13] Even were one to assume that prior to 1947 the I.C.C. had jurisdiction over the actions of labor organizations in contracting with respect to matters affecting interline practices, it would appear perfectly plain that the subsequent enactment of the Labor Management Relations Act of 1947, deprived the Commission of whatever possible jurisdiction it might previously have had, and placed jurisdiction over them in the NLRB. Such an occurrence is not unusual. Congress in other situations has sometimes carved out areas from an administrative agency's scope and placed them within the superseding jurisdiction of another agency. *Eugene*

state Commerce Act. This is particularly true since both Acts have as an objective the elimination of obstructions to commerce. Congress, not having considered the making or enforcement of "struck goods" agreements a sufficient obstruction to interstate commerce as to require their proscription under Taft-Hartley, and not having made any exception in respect to the operation of the Interstate Commerce Act, it would follow that such agreements stand protected regardless of the provisions of the Interstate Commerce Act. In other words, it must have appeared more important to Congress that certain practices be permitted in the area of labor relations than that an occasional but limited interference with the duty of the common carriers to accept and deliver merchandise should take place. Obviously strike action would occasion more than limited interference with such duty, but Congress nevertheless gave it paramount protection in Taft-Hartley.

(6) This Court in its decisions in *Weber v. Anheuser-Busch, Inc.* 348 U.S. 468, and in *General Drivers v. American Tobacco Co.*, 348 U.S. 978, has already given plain indication that it considers activities and practices permitted under Taft-Hartley to supersede state restraint-of-trade statutes (the *Weber* case) and state policy respecting the common law duties of common carriers to accept freight (the *American Tobacco* case). Indeed, the *American Tobacco* case involved a situation almost identical to that involved in the present case including the presence of a

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Dietzgen Co. v. FTC, 142 F.2d 321, 331 (CA 7, 1944); cert. den. 323 U.S. 730 (1944); *United Corp. v. FTC*, 116 F.2d 473, 475 (CA 4, 1940); *Chamber of Commerce of Minneapolis v. FTC*, 13 F.2d 673, 685-686 (CA 8, 1926); *U.S. v. Western Union Telegraph Co.*, 53 F. Supp. 377, 381 (S.D. N.Y., 1943); *T. C. Hurst & Son v. FTC*, 268 Fed. 874, 877 (E.D. Va., 1920); *Far East Conference v. U.S.*, 342 U.S. 570, 573-574 (1952); *U.S. v. Rock Royal Cooperative*, 307 U.S. 533, 558-560 (1939); *U.S. Navigation Co. v. Cunard S. S. Co.*, 284 U.S. 474, 485 (1932); cf. *U.S. v. American Trucking Assns.*, 310 U.S. 534, 544-545 (1940); *Brougham v. Blanton Mfg. Co.*, 249 U.S. 495, 499 (1919).

"struck goods" clause. Nevertheless, this Court had no hesitancy in finding the jurisdiction of the National Labor Relations Board under Taft-Hartley to determine rights and duties of employers and employees thereunder to be paramount. The need for "centralized administration" (*Garner v. Teamsters Union, supra*) or "a single paramount administrative or judicial authority" (*Amazon Cotton Mill v. Textile Workers Union, supra*, p. 186) remains the same regardless of whether possible supersession appears from a state or Federal source.

CONCLUSION

It is difficult to escape the conclusion that a majority of the present Board members, in an effort to reach what they apparently considered an evil—the "struck goods" clause—have substituted, out of personal predilection, their concept of what the scope of the secondary boycott prohibitions of Section 8(b)(4)(A) should be for that of the Congress. It would appear plain that acceptance of their theory of the scope and application of Section 8(b)(4)(A) would constitute administrative legislation of the most flagrant nature. But the Board may not "pause to consider whether a statute differently conceived and framed would yield results more consonant with fairness and reason," as the present Board conceives those terms. *Anderson v. Wilson*, 289 U.S. 20, 27. In point is *Colgate-Palmolive-Peet* v. N.L.R.B., 338 U.S. 355, 363:

> "It is not necessary for us to justify the policy of Congress. It is enough that we find it in the statute. That policy cannot be defeated by the Board's policy, which would make an unfair labor practice out of that which is authorized by the Act . . . To sustain the Board's contention would be to permit the Board under the guise of administration to put limitations in the statute not placed there by Congress."

Especially, may neither administrative tribunals nor the courts seek to substitute their judgment for that of Congress when there is involved, as here, an enactment as

controversial as Taft-Hartley. As stated, by the Second Circuit in *Rabouin v. N.L.R.B.*, 195 F.2d at 912:

> " . . . in a matter of such bitter controversy as the Taft-Hartley Act, the product of careful legislative drafting and compromise beyond which its protagonists either way could not force the main body of legislators, the courts should proceed cautiously."

It is respectfully submitted that the decision of the Court below should be affirmed.

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APPENDIX A

MILK DRIVERS UNION v. NLRB
(Crowley's Milk Co.)
U.S. Court of Appeals,
Second Circuit (New York)

MILK DRIVERS AND DAIRY EMPLOYEES LOCAL UNION No. 338, AFL-CIO v. NATIONAL LABOR RELATIONS BOARD; MILK DRIVERS AND DAIRY EMPLOYEES LOCAL No. 680, AFL-CIO v. Same, Nos. 346 and 347, June 19, 1957.

Before CLARK, Chief Judge, and SWAN and POPE, Circuit Judges.

Full Text of Opinion

CLARK, Chief Judge:—Milk Drivers and Dairy Employees Local 338 and Milk Drivers and Dairy Employees Local 680 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO, petition this court to review and set aside two orders of the National Labor Relations Board based on findings by the Board that each petitioner was guilty of violating §§ 8(b)(4)(A) and 8(b)(4)(B) of the Labor Management Relations Act of 1947, 29 U.S.C. §§ 158(b)(4)(A) and 158(b)(4)(B). 116 NLRB 1408, 39 LRRM 1004. The Board seeks enforcement of these orders. The two cases spring from a common factual background and were consolidated before the Board. The orders are directed against refusals by the locals to handle "hot cargo," i.e., products received by a secondary employer from a primary employer with whom they have a labor dispute.

[HOT CARGO CLAUSE]

Crowley's Milk Company, Inc., the primary employer operates four large plants, where it manufactures and processes milk, cheese, ice cream, and other dairy products which it sells to numerous distributors. Crowley's em-

ployees are and were represented by other unions, and since 1948 Locals 338 and 680 have unsuccessfully attempted to become these employees' bargaining representatives. In 1955 the two locals adopted a common plan whereby on April 1, 1955, Local 338 would begin to picket Crowley's two New York plants and simultaneously Local 680 would start to picket Crowley's New Jersey plant. The locals were in a position to jeopardize Crowley's business relations with ice cream and milk distributors, because the employees of many of these distributors were members of the two locals. The distributors and the two locals were parties to several collective bargaining agreements containing the following hot cargo clause:[1]

> "It shall not be a violation of this agreement for members of the Union to refuse to handle material in the possession of the Employer received from any employer with whom Local 338, or Local 584, or Local 602, or Local 607, or Local 680 is directly engaged in a labor dispute, provided such material comes into the Employer's possession more than 48 hours after the union gives written notice to the Employer of the existence of such labor dispute. It shall not be a violation of this agreement for the members of the union to refuse to make deliveries to or pickups from any employer with whom Local 338, Local 584, or Local 602, or Local 607, or Local 680 is directly engaged in a labor dispute, provided such refusal occurs more than 48 hours after the union has given written notice to the Employer of the existence of such labor dispute."

Thus in the event of a serious dispute between Crowley's and these locals it was likely that the employees and perhaps the employers of some of Crowley's customers would be loath to handle Crowley's products. The cases are concerned with the unions' relations with these secondary employers; the unions' relations with the primary employer, Crowley's, are not before us.

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[1] In Local 680's contract the secondary employers also agreed that they would "not aid other companies in any fight that may be waged against the Union."

[FACTS OF CASE]

The facts of the case involving Local 338 are not disputed. On March 17, 1955, the local sent a letter to all employers who were parties to collective agreements with it, notifying them that the two locals were directly engaged in a labor dispute with Crowley's, reminding them of the hot cargo clause, and announcing: "We shall expect that, by or before April 1, 1955, you will discontinue receipt of any materials of Crowley's Milk Company * * * as long as this labor dispute continues." Edward Greco d/b/a Maple Grove Dairy was one of the secondary employers notified, and he replied that he would not co-operate for six to eight weeks, until he could get containers made up under his trade name for the by-products normally purchased from Crowley's. Negotiations between Greco and Local 338 continued until August 8, 1955, at which time Greco's employees, on instructions from the union, refused to handle Crowley's products. Greco did not acquiesce in his employees' refusal, but on August 9 posted a written notice on the bulletin board in the company drivers' room directing them to distribute and sell Crowley's products. Notwithstanding the notice, the employees on instructions from Local 338 refused to handle the products.

There is disagreement as to activities of Local 680, but it is clear that it sent notices almost identical to those described above to numerous secondary employers who were customers of Crowley's. These notices were also sent to union stewards of these secondary employers with the following explanatory note:

> "Dear Sir and Brother:
>
> "Enclosed find copy of letter that was sent to your employer. Please see to it that all members under your jurisdiction will abide by the enclosed letter."

It was stipulated that some stewards posted these letters on the bulletin boards, and there is evidence that some

members of the union were informed of their contents by word of mouth. Since the Intermediate Report, which the Board majority adopted, does not resolve the conflicts in testimony as to the union's policy, we adopt for purposes of decision here the union's version that it encouraged the secondary employees to refuse to handle Crowley's goods after April 1 unless and until secondary employers gave direct orders to do so. In fact the union contended that its policy was even milder, eschewing "concerted" refusals under any conditions; but there is substantial evidence to support the finding that concerted action was sought.

[THEORY OF BOARD]

The trial examiner did not determine whether or not the secondary employers involved in the Local 680 case gave direct orders to handle hot cargo which the union ordered disobeyed. His reason, adopted by the Board, was that under recent rulings of the Board it is an unfair practice for a union to encourage concerted refusals to handle goods of other employers, regardless of employer acquiescence in the invocation of a hot cargo clause. The Board recognizes that these recent decisions are opposed to our holding in Rabouin v. N.L.R.B., 2 Cir., 195 F.2d 906, 29 LRRM 2617, and asks us to overrule that case.

This not the occasion for reversing ourselves in deference to administrative expertise, for the legal question is one of legislative intent and statutory construction as to which the courts are fully competent and, indeed, have the ultimate responsibility. Moreover, the present issue has divided the agency into three fragmentary views which seem to be still in the process of development. Having satisfied ourselves again that our former position appears sound, we reaffirm our earlier decision. In view, however, of the Board's new position and the division among the circuits, perhaps some further analysis is in order.

In the Board's first encounter with this problem a ma-

jority found no unfair practice where the union's concerted refusal was in accord with a hot cargo clause and the secondary employers acquiesced rapidly in the employees' refusal to touch hot cargo. The majority opinion stated three reasons for its result: (1) doubt as to whether the boycott was "secondary"; (2) the employers' rapid acquiescence after the union started the boycott; (3) the employer's advance consent embodied in the hot cargo clause. The Board explained the last ground, saying that where the employer consented in advance by putting such a clause in the collective bargaining agreement there was not " 'a strike or a concerted refusal in the course of their employment to use' etc. 'where an object thereof is: (A) *forcing or requiring*' " because the advance agreement of the employer deprived the later union acts of the requisite quality of insubordination. Rabouin d/b/a Conway's Express, 87 NLRB 972, 982, n. 29, 25 LRRM 1202, with Chairman Herzog concurring in the result and one member dissenting. We affirmed the Board's result, approving this third rationale. Rabouin v. N.L.R.B., supra, 2 Cir., 195 F.2d 906, 912, 29 LRRM 2617: "Consent in advance to honor a hot cargo clause is not the product of the union's 'forcing or requiring any employer * * * to cease doing business with any other person' § 8(b)(4)(A)."

[ELEMENT OF COERCION]

The statutory language is clear: there is no violation of § 8(b)(4) unless the union encourages the employees to *coerce* the secondary employer. Where the employees are encouraged only to exercise a valid contractual right to which the employer has agreed there is no coercion.[2] Nor-

[2] Accord, General Drivers, Chauffeurs, Warehousemen and Helpers Union, Local No. 886, AFL-CIO v. N.L.R.B., D. C. Cir., May 9, 1957, 40 LRRM 2049; Madden v. Local 442, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A.F.L., D. C. W. D. Wis., 114 F.Supp. 459, 38 LRRM

mally the secondary employer receives something at the bargaining table in exchange for granting the hot cargo clause, and he is no more coerced when the employees subsequently exercise their privilege than a landowner is coerced when those to whom he was granted licenses cross his land.

It will not do to say that encouraging work stoppages should be an unfair practice, even in the absence of secondary employer coercion because the effect on the primary employer and the public at large is the same although the secondary employer consents. There is some difference to the public between an ordinary boycott of which it had no warning and which may be called for any purpose and a refusal to handle strike-bound goods under the terms of a hot cargo clause. The latter stoppage is less vexatious because it can be anticipated and is limited to the situations prescribed in the clause. But even without such distinctions in effect the Congressional language is clear and we should not expand the prohibitions of the Act merely because the language which eventually emerged from the legislative struggle produces some anomalies. See Rabouin v. N.L.R.B., supra, 2 Cir., 195 F.2d 906, 912, 29 LRRM 2617.

Both the petitioners and the Board see in the legislative history some factors to support their respective positions. The Board points to the Congressional abhorrence of sec-

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2190; Contra: N.L.R.B. v. Local 1976, United Brotherhood of Carpenters and Joiners of America, A.F.L., 9 Cir., 241 F.2d 147, 39 LRRM 2428; Douds v. Milk Drivers and Dairy Employees Local No. 680, D. C. N. J., 133 F.Supp. 336, 341-342, 36 LRRM 2410 (dictum); Alpert v. United Brotherhood of Carpenters and Joiners of America, AFL-CIO, D. C. Mass., 143 F.Supp. 371, 38 LRRM 2420, noted 70 Harv. L. Rev. 735 (1957); Note, Hot Cargo Clauses as Defenses to Violations of Section 8(b)(4)(A) of the LMRA, 64 Yale L. J. 1201 (1955); cf. N.L.R.B. v. Local 11, United Brotherhood of Carpenters & Joiners of America, AFL, 6 Cir., 242 F.2d 932, 39 LRRM 2731.

ondary boycotts,[3] and the petitioners find indications that invocation of a hot cargo clause was not what the congressmen meant by "secondary boycott."[4] The Board stresses the interference with the public interest produced by any work stoppage,[5] and the petitioners point out that more recent efforts to get Congress to outlaw hot cargo clauses were defeated.[6] We do not think such tangential legislative history authorizes us to go behind the clear language.

[LATEST POSITION OF NLRB]

The Board's latest position, as we understand it, is that hot cargo clauses are not contrary to public policy, but that encouraging union men to exercise them is an unfair practice. This view started with the concurring opinion of Chairman Farmer in McAllister Transfer Inc., 110 NLRB 1769, 1788-1790, 35 LRRM 1281.[7] Chairman Farmer first stressed, as do we, the statute's requirement that the secondary employer be *coerced*. He then distinguished our Rabouin decision on the ground that the secondary employers there had immediately acquiesced in the boycott, whereas the secondary employers in the McAllister case "posted notices to their employees directing them to handle

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[3] 93 Cong. Rec. A-1222, 4198-4199, 4838, 4863; Sen. Rep. No. 105, 80th Cong., 1st Sess. 8, 22; Hearings before Senate Committee on Labor and Public Welfare on S.55 and S. J. Res. 22, 80th Cong., 1st Sess. 381-398, 1715-1729.

[4] These are collected in the dissenting opinion of Members Murdock and Peterson in McAllister Transfer Inc., 110 NLRB 1769, 1790-1799, 35 LRRM 1281.

[5] 93 Cong. Rec. A-1222, 4198, 4838, 4860, 4863.

[6] S. 2989, 83d Cong., 2d Sess., printed at 100 Cong. Rec. 6125; S. 3842, 84th Cong., 2d Sess., printed at 102 Cong. Rec. 8021.

[7] Prior to McAllister the Board decided Pittsburgh Plate Glass Co., 105 NLRB 740, 32 LRRM 1350, in which it not only reaffirmed its approval of our Rabouin decision, but buttressed it by construing the words in § 8(b)(4) "in the course of their employment" as requiring that the work which the secondary employees refuse to perform be work which they previously agreed to perform.

all freight without discrimination." 110 NLRB 1769, 1790, 35 LRRM 1281. He thus made determinative the secondary employer's reaction to the union's invocation of the hot cargo clause.[8]

Since Chairman Farmer's opinion this doctrine has undergone considerable change. In Sand Door and Plywood Co., 113 NLRB 1210, 36 LRRM 1478, enforced N.L.R.B. v. Local 1976, United Brotherhood of Carpenters and Joiners of America, AFL, 9 Cir., 241 F.2d 147, 39 LRRM 2428, a two-member majority declared that it was expressing "essentially the view expressed by Chairman Farmer in his concurring opinion in the McAllister case" and went on to amplify: "The employer, but not the union, may instruct his employees to cease handling goods sought to be boycotted. Until the employer instructs his employees that they need not handle the 'unfair' product, a strike or concerted refusal to handle such goods [is an unfair practice]."[9] In this version it is an unfair practice to invoke a hot cargo clause while the employer remains silent as to whether he acquiesces or not. Presumably the "majority" in the Sand Door case would not have distinguished Rabouin, but overruled it.[10] The Sand Door majority, whose language the present trial examiner took to be the law, did not discuss the requirement of coercion, but instead quoted selected passages from the legislative history demonstrating that the lawmakers were against secondary boycotts and in favor of the public interest.[11]

The doctrine received a further development in American

[8] Chairman Farmer's vote was decisive because two other members adhered to the original Rabouin decision and the two "majority" members thought hot cargo clauses were against public policy.

[9] 113 NLRB 1210, 1216, n. 20, 1217, 36 LRRM 1478.

[10] In addition to the "majority" opinion one member concurred on the ground that the clauses were against public policy and two members dissented, adhering to the Board's earlier view.

[11] 113 NLRB 1210, 1216, n. 21, 36 LRRM 1478.

Iron and Machine Works, Co., 115 NLRB 800, 37 LRRM 1395, enforcement denied General Drivers, Chauffeurs, Warehousemen and Helpers Union, Local No. 886, AFL-CIO v. N.L.R.B. D.C. Cir., May 9, 1957, 40 LRRM 2049. There a two-member majority, expressly relying on the Sand Door case, restated the doctrine as follows:

> "Thus, while Section 8(b)(4)(A) does not forbid the execution of a hot cargo clause or a union's enforcement thereof by appeals to the employer to honor his contract, the Act does, in our opinion, preclude enforcement of such clause by appeals to employees, and this is so whether or not the employer acquiesces in the union's demand that the employees refuse to handle the 'hot' goods. Accordingly, in affirming the Trial Examiner, we do not find it necessary to rely, as he did, on the fact that the secondary employers herein did not acquiesce in the refusal of their employees to handle American Iron's freight." [12]

In this most recent statement the reaction of the secondary employer has become wholly irrelevant, and there is still no explanation as to how the majority supplies the missing element of "coercion." Although only this latest position is urged upon us by the Board, we have considered both it and Chairman Farmer's original version and rejected them both. The latest Board view fails to distinguish between instances of employer coercion and instances of employer consent. Chairman Farmer's position, while recognizing the need for such a distinction, ignores the statutory language requiring a "strike" or "concerted refusal in the course of their employment." In the absence of a prior agreement, work to be done by employees is determined unilaterally by the employer; but where a collective agreement specifies the work to be done, that agreement defines the normal work of the employees and a "strike" or "refusal" must be a refusal to do that normal

[12] 115 NLRB 800, 801, 37 LRRM 1395. As in Sand Door, one member concurred and two dissented.

work. The employer obviously cannot impose additional work on the employees contrary to the agreement and then charge that their refusal to perform it constitutes an unfair practice. We see no difference in this respect between tasks exempted by the agreement because they are offensive to health or safety and tasks exempted because their performance is contrary to the interests of organized labor and, in this case, the local itself.

[PUBLIC POLICY]

We also do not accept the argument that hot cargo clauses are against public policy. The advocates of this view ignore the statutory language to talk about "secondary boycotts" and the undoubted Congressional dislike of them. Having assumed that refraining from work described in a hot cargo clause is a "secondary boycott," they frame the issue in terms of whether a hot cargo clause is a defense to a § 8(b)(4) unfair practice.[13] We cannot agree with this characterization of the issue. There is no need for a "defense" unless there has been a violation; and in determining the latter question we look to the statutory language, rather than the vague concept "secondary boycott," about which the legislators sometimes talked, but which

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[13] McAllister Transfer, Inc., supra note 4, 110 NLRB 1769, 1777-1786, 35 LRRM 1281; Sand Door and Plywood Co., 113 NLRB 1210, 1219-1229, 36 LRRM 1478, enforced N.L.R.B. v. Local 1976, United Brotherhood of Carpenters and Joiners of America, AFL, 9 Cir., 241 F.2d 147, 39 LRRM 2428, American Iron and Machine Works Co., 115 NLRB 800, 802-803, 37 LRRM 1395, enforcement denied General Drivers, Chauffeurs, Warehousemen and Helpers Union, Local No. 886, AFL-CIO v. N.L.R.B., D. C. Cir., May 9, 1957, 40 LRRM 2047.

they did not write into the Act.[14] For the reasons already given we hold that there is no "forcing," "requiring," "concerted refusal in the course of their employment," or "strike," and consequently no violation.

Petitions to review granted; orders reversed and enforcement denied.

Concurring Opinion

SWAN, Circuit Judge (concurring): I concur in the result. The Board recognizes that the orders are opposed to our decision in Rabouin v. N.L.R.B., 2 Cir., 195 F.2d 906, 29 LRRM 2617, and asks us to reconsider it. I am unwilling to reconsider a problem so recently passed upon by this court and have not done so. Consequently I would deny enforcement and reverse the orders on the authority of the Rabouin case.

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[14] See Note, Hot Cargo Clauses as Defenses to Violations of Section 8(b)(4)(A) of the LMRA, 64 Yale L. J. 1201, 1206 (1955). This point is recognized by the Senator who has introduced one of the bills cited in note 6 supra, designed to outlaw hot cargo clauses. After pointing out that the present statutory phraseology has not proven sufficient to cover all cases of secondary boycott and stating that "the present Board has adopted a more reasonable view of the matter," he goes on to urge that "the problem is so important that it should not be left to the opinions of appointees to administrative office. Congress must speak once and for all in regard to the matter." Explanatory Statement of Senator Curtis, May 14, 1956, introducing S. 3842 to amend § 8(b)(4) to outlaw hot cargo clauses, 102 Cong. Rec. 8022.